Supreme Court, U.S.
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In The

Supreme Court of the United States

Margaret A. Badura, Kirk L. Meisinger, David J. Cullan,
Interested Persons,

Petitioners,

v.

The State of Nebraska, Susan Spahn, Gerald Friedrichsen
and Fitzgerald Schorr Barmettler & Brennan

Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Neb. Rev. Stat. § 30-2626 is unconstitutional because it allows a court absolute discretion to take complete control of a person's life, liberty, and property in an *ex parte* hearing and to continue that control without specific guidelines for what is an emergency or good cause to extend the *ex parte* order?

2. Whether a court's refusal to allow an allegedly incapacitated person to use his own funds to pay counsel and court fees to contest an allegation of incapacity and to pursue a statutorily guaranteed appeal of a declaration of incapacity violates the allegedly incapacitated person's rights that are guaranteed by the Constitution of the United States.

3. Whether a single law firm's simultaneous representation of both the Petitioner and the Guardian/Conservator in a contested action for a declaration of incapacity is a conflict of interest of sufficient magnitude to violate basic rights to due process and, therefore, nullify fee awards made to that law firm for actions taken while that conflict existed.

PARTIES TO THE PROCEEDING

Petitioners: Margaret A. Badura, Kirk L. Meisinger, David J. Cullan, interested persons on behalf of Everett Larson, an incapacitated person, now deceased.

Respondents: The State of Nebraska; Susan J. Spahn; Gerald Friedrichsen; and the law firm of Fitzgerald, Schorr, Barmettler & Brennan, PC, LLO law firm simultaneously representing the Petitioner and Guardian/Conservator.

Additional Parties and Persons Involved Below: Barbara Prokupek, Petitioner seeking adjudication that Everett Larson was an incapacitated person; W. Henry Looby, Temporary and later Permanent Guardian/Conservator of Everett Larson; Sally Hytrek, Hytrek Law Office, Guardian Ad Litem for Everett Larson; Steve Lefler, attorney for Guardian ad Litem for Everett Larson; John E. Lynch, Jr., attorney for W. Henry Looby; Kevin J. Dostal, Patrick K. Nields, Locher, Pavelka, Dostal, Braddy & Hames, LLC, law firm succeeding to representation of Petitioner and Guardian/Conservator following death of Everett Larson.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners, parties, or interested persons involved in this case meets the requirements for corporate disclosure required by Supreme Court Rule 29.6.

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OPINIONS BELOW

The first opinion of the Nebraska Supreme Court in this case was issued on January 13, 2006, and is reported as *In re Larson,* 270 Neb. 837, 708 N.W.2d 262 (2006) (Petitioners' Appendix ("Pet. App.") at 1a. The opinion of the Probate Court finding Larson incapacitated and refusing to allow payment to his attorneys and/or experts is an unreported opinion issued on November 27, 2006 (Pet. App. at 27a.

The opinion of the Probate Court refusing to allow Larson to proceed *in forma pauperis* is an unreported opinion issued on January 17, 2007 is Pet. App. 49a.

The unreported Order of January 28, 2008 denying application for attorney fees by attorneys Badura, Cullan, and Meisinger after Larson's death is at Pet. Ap. 55a.

The Memorandum Opinion of the Nebraska Supreme Court denying the appeal of the direct application of Larson's Counsel for payment of attorneys fees was issued on March 11, 2009, and is an unreported opinion appearing only in a table of cases released on or about March 11, 2009, Pet. Ap. 59a.

The Nebraska Supreme Court's order denying the attorneys' motion for rehearing is an unreported order dated April 22, 2009.

STATEMENT OF JURISDICTION

The decision of the Nebraska Supreme Court sustaining the Probate Court's refusal to allow payment of attorneys and experts defending Larson against the allegations he was incapacitated was entered on March 11, 2009.

A timely motion for rehearing was filed with the Nebraska Supreme Court which was denied on April 22, 2009. No extension of time in which to file this Writ was requested.

This court has jurisdiction over this Writ pursuant to 28 U.S.C. § 1257 (a) because the following holdings were adopted by the highest Court of the State of Nebraska and are repugnant to important individual rights and liberties conferred by the United States Constitution:

> That Neb. Rev. Stat. § 30-2626 allows a judge to deprive an individual of control over his life, liberty, and property for an unlimited period of time without any evidentiary finding of incapacity;
>
> That a court may use the estate of an alleged incapacitated person to pay the expenses and fees of the Petitioner while refusing to allow the subject of the proceeding to use his or her funds to pay counsel or experts to contest the petition; and
>
> Allowing Petitioner's counsel to simultaneously represent the guardian/conservator throughout contested proceedings.

Further, the failure of the Nebraska courts to enforce the Nebraska statutes governing protection of incapacitated persons and their property violates the Fourteenth Amendment's guarantee of equal protection under the law.

This Court should also accept jurisdiction in this matter because although Larson has died, rendering certain aspects of the suit moot, this is a case in which the same situation could arise again but continue to evade review because many allegedly incapacitated individuals are elderly or have health problems limiting remaining life span.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person the equal protection of the laws.

Nebraska Statutes discussed herein which are set out in more detail in the Appendix are:

Neb. Rev. Stat. § 30-2626(a);

Neb. Rev. Stat. § 30-2626(e);

Neb. Rev. Stat. § 30-2625(c);

Neb. Rev. Stat. § 30-2627(b);

Neb. Rev. Stat. § 30-2628(a)(1)

STATEMENT OF THE CASE

Facts and Background: On August 3, 2004, Barbara Prokupek filed a petition and in an *ex parte* hearing asked the Probate Court to declare her father, Everett D. Larson, an incapacitated person and appoint W. Henry Looby as guardian and conservator of Larson's assets and living arrangements. The Probate Court granted the request and entered an temporary order appointing guardian/conservator as allowed by Neb. Rev. Stat. § 30-2626.

The Probate Court made no finding of record identifying the "emergency," and did not limit Looby's duties to those necessary to deal with the "emergency."

At the time of the *ex parte* hearing, both Prokupek and Looby knew that Larson had signed a power of attorney appointing Joseph Toman as Larson's attorney in fact and as holder of Larson's durable power of attorney for health care. If the Probate Court had been informed of these powers of attorney, the court would have been required to apply the preferences for guardian/conservator from Neb. Rev. Stat. § 30-2627(b). The existence of these documents, however, was not disclosed to the court. When these documents were later revealed to the Probate Court, the court refused to apply the statutory priorities.

Larson obtained counsel, Mary Wilson, to contest the proceedings to have him declared incapacitated. A Guardian ad Litem ("GAL"), Sally Hytrek, was appointed. From the date the GAL was appointed in 2004 until the Nebraska Supreme Court's decision in Larson I in January 2006, the Probate Court held no evidentiary hearings. The Court's decisions were based only on the GAL's report and unsworn assertions of Petitioner and her attorney.

In Larson's first meeting with the GAL, Larson denied needing a guardian but said that if a guardian were appointed, he did not want it to be Looby.

Despite the duty of the GAL being to Larson, Hytrek reported to the Court that Larson disliked and distrusted Looby but Hytrek believed Looby should remain as temporary guardian regardless of Larson's vehement opposition.

Mary Wilson, ostensibly still Larson's counsel, opined to the GAL that Prokupek, presumably a beneficiary of Larson's estate, was entitled to exercise some control over Larson's affairs. Wilson, therefore, refused to object to Looby's continued appointment despite Larson's objection to Looby's appointment.

Larson, from a small farming community outside Omaha, was moved at Looby's direction to a facility in Omaha. Larson realized Wilson was not advocating against the guardianship. Despite Looby's limitations on Larson's contact with anyone not approved by Looby or Prokupek, Larson managed to contact Kirk Meisinger, a relative of a family from Larson's small home town. Larson remembered Meisinger was an attorney practicing in Omaha. Larson contacted Meisinger who assisted Larson in engaging attorneys Dave Cullan and Marge Badura who were experienced in elder law and in proceedings to contest a petition alleging incapacity.

In or about December 2004, Larson wrote Ms. Wilson that her services were no longer needed. Ms. Wilson, however, expressed concern about Larson's ability to discharge her because Larson remained under a "temporary" order stating he was incapacitated. Shortly after Larson tried to fire Wilson, attorneys Badura, Cullan, and Meisinger attempted to enter their appearance as Larson's counsel. These attorneys asked that the guardianship/conservatorship be dismissed because more than 90 days had passed since the temporary order was entered and there had been no evidentiary hearing and no determination of Larson's capacity.

The Probate Court refused to hear Wilson's motion to withdraw, refused to allow the new counsel to enter their appearance, and ultimately ordered Badura, Meisinger and Cullan to have no contact with Larson.

Also in or around December 2004, Looby asked the court for permission to take control of all Larson's assets so that Larson could not spend any money or make any financial decisions. After taking control of Larson's assets, Looby (without court permission) put Larson's assets into a trust and hired an attorney to file suit to nullify a transfer of real property made by Larson shortly before Larson's daughter decided he was incapacitated.

In the Spring of 2005 an appeal was taken from certain Probate Court orders. In January, 2006, the Nebraska Supreme Court issued its order finding fault with many of the county court's actions. (See Pet. Ap. 21a – 26a.) The Nebraska Supreme Court found it was plain error for the Probate Court to refuse Larson to be represented by counsel of his choice and plain error to enter consecutive "temporary" orders appointing a "temporary" guardian/conservator without having an evidentiary hearing or making a finding on Larson's capacity.

In January 2006 the case was remanded with directions. The probate judge ordered trial to commence immediately, despite the fact that Larson's attorneys had not been able to talk to him for more than a year and were still under a no contact order. Larson's attorneys had not had the opportunity to retain experts or depose the Petitioner's experts. The court ultimately allowed some time for Larson's attorneys to prepare for trial but refused to clear a block of time on her calendar for the trial. The evidentiary hearings regarding Larson's capacity, therefore, were strung out through 39 separate hearing dates over nine months. The Probate Court continued to refuse to allow Larson funds to retain an expert or to pay his counsel.[1]

In November 2007, the Probate Court declared Larson incapacitated. Larson was determined to appeal this finding and a timely notice of appeal was filed on his behalf. Looby, still Larson's guardian/conservator, refused to release funds for preparation of an appellate record.

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[1] Throughout the evidentiary proceedings, the Probate Court made it clear that she did not want to hear evidence supporting Larson's contention that he was not incapacitated. The court repeatedly chastised Larson's attorneys for becoming involved in the case and "dragging out the proceedings."

Having no access to any funds, Larson moved the Probate Court to allow him to proceed *in forma pauperis* or to order the guardian/conservator to pay for the appellate record. The Probate Court refused to do either.

Denial of a motion to proceed *in forma pauperis* is a final order and a timely appeal was filed. The appeal on Larson's right to proceed *in forma pauperis* was fully briefed and set for oral argument when Larson died. Larson's counsel could not revive this appeal because Larson's financial inability to pay for a record was personal. Similarly, the issue of Larson's capacity could no longer be appealed.[2]

Because his counsel did not have standing to pursue the issues of Larson's prior appeals after his death, the attorneys returned to the Probate Court and asked for rehearing on the court's refusal to pay any fees to Larson's counsel. The Probate Court denied the request for rehearing.[3]

The attorneys appealed the Probate Court's order and the Nebraska Supreme Court held that because an appellate decision was never rendered on the Probate Court's substantive findings, the Supreme Court could not alter the Probate Court's decision to refuse to pay fees or expenses to Larson's counsel.

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[2] Although both the Probate Court and the Nebraska Supreme Court have suggested that the fact that Larson's attorneys failed to raise the issue of attorneys fees in the prior appeals, as long as Larson was the appellant, he did not need to include that issue. Had Larson won his appeal and been determined to have capacity (whether he proceeded *in forma pauperis* or with money from his estate) he would have paid his attorneys the amount he had contracted to pay them.

[3] Jane Prochaska, the Probate Court judge who conducted all hearings from August 2004 through December 2006, retired on December 31, 2006, so although the motion for rehearing was to the same Probate Court that issued the original order, the probate judges said they could not alter any of Judge Prochaska's orders because that would be an appellate function.

The record reveals clearly that the Probate Court had predetermined Larson's incapacity. When Larson retained Badura, Cullan and Meisinger to defend him, they were already fighting an uphill battle. Assertions and accusations were made and incrporated into opinions vilifying Larson's counsel for "unnecessarily" prolonging the litigation by presenting evidence that Larson was not incapacitated, "overlawyering," and having more than one attorney representing Larson. Absent from these accusations is any mention of the fact that Fitzgerald Schorr sent two attorneys – its senior "elder law" attorney and the head of their litigation department to every contested hearing.

Even before the Supreme Court ordered the Probate Court to allow Cullan, Badura and Meisinger to appear for Larson, the Fitzgerald Schorr law firm had been allowed $663,336.54 in fees. Nearly $50,000 of that amount was for opposing Larson's right to choose his own counsel in the first appeal. Prior to the Supreme Court's opinion in Larson I, the Probate Court had already approved fees to John Lynch, also representing Looby, in the amount of $30,142.50; Greg Drew, the attorney attempting to set aside Larson's transfer of land to Toman, in the amount of $8,273.28; $21,888.70 to Sally Hytrek, the GAL; $1,302.50 to Steve Lefler, attorney for the GAL; $8,181.25 to Mary Wilson, even though Larson had attempted to fire her, and $44,412.08 to Henry Looby.[4]

There is no dispute that this litigation was far more expensive and complicated than it should have been. The cause of the expense in large part, however, was the Probate Code's refusal to exercise discretion in managing fees. The only fees reduced or disallowed were those of Larson's counsel. Particularly egregious are the fees paid to Greg Drew for the lawsuit which was not approved by the Probate Court and was specifically identified by the Nebraska Supreme Court as one of the ways in which Looby had exceeded the power conferred in a "temporary" appointment.

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[4] Not all of the identified fees had been paid prior to January 13, 2006, but the fees had been requested and approved by the Probate Court.

This case raises important issues regarding fundamental liberties and rights: (1) the extent to which a statute can confer discretion upon a judge to determine what constitutes "due process" when matters of life, liberty, and property are at issue; (2) whether refusing to allow an allegedly incapacitated person to use his or her own money to hire counsel to contest a finding of incapacity is a violation of federally-protected rights; and (3) whether the conflict created where the same counsel represents both the petitioner and the guardian/conservator in a contested action for a declaration of incapacity is a violation of federally-protected rights.

ISSUES RAISED AND DECIDED

(1) Unlimited Use of Temporary Orders and Unequal Application of Other Laws. The first issues raised by attorneys Badura, Cullan, and Meisinger were the violations of both federal civil rights and Nebraska law that result from taking away Larson's rights to his liberty and property without any evidentiary support for those actions. Larson's attorneys also challenged the court's refusal to allow Larson to select his own counsel. Despite the efforts of Larson's counsel and the direction of the Nebraska Supreme Court, however, the Probate Court failed to automatically vacate her order that Badura, Cullan and Meisinger have no contact with Larson. On February 22, 2006, Badura, Cullan, and Meisinger filed a motion requesting leave to contact their client.

On February 23, 2006, Larson's attorneys asked for funds from Larson's estate to retain an expert on Larson's mental condition. Larson's funds had already been used by the Petitioner to pay experts testifying for the petitioner.

In its initial review, the Nebraska Court found the Probate Court's failure to conduct evidentiary hearings and refusal to allow Larson to select his own counsel was plain error. The Court said:

> [W]e note that the record before us raises many concerns with regard to the manner in which the court has conducted its proceedings. Most egregious is the court's failure to hold an evidentiary hearing on Larson's competency during the approximately 8 months of proceedings which took place under a temporary guardianship and conservatorship.
>
> Section 30-2619(b) states that upon the filing of a petition for a finding of incapacity and appointment of a guardian, the court "shall set a date for hearing on the issues of incapacity." Section 30-2619(d) provides:
>
> The person alleged to be incapacitated is . . . entitled to be present by counsel, to compel the attendance of witnesses, to present evidence, to cross-examine witnesses . . . and to appeal any final orders or judgments. . . . .[I]f an emergency exists, a temporary guardian "to address the emergency" may be appointed by ex parte order of the court "pending notice and hearing." . . . [T]he temporary guardianship shall terminate at the end of the 90-day period in which the temporary guardianship is valid . . . Provision is made for the extension of the 90-day period "[f]or good cause shown." § 30-2626(d).
>
> [A]n evidentiary hearing should be held expediently on a guardianship or conservatorship petition and ...temporary guardians and conservators are

> intended to exercise their powers in a limited manner and for a limited period of time. . . . *This rule cannot be circumvented by continuous extensions of a temporary guardianship, nor are numerous reports by a GAL a substitute for an evidentiary hearing.* . . . (Emphasis added.)

The Nebraska Supreme Court then stated:

> [I]t is hard to imagine what "good cause" could justify a delay of 8 months. . . . Larson has clearly asserted that he is not incapacitated, at least not to the extent asserted by the petition for the appointment of a guardian and conservator. Yet the court, under the advice primarily of the GAL, appears to treat Larson's complete incompetence as a foregone conclusion. Without . . . an evidentiary hearing . . . the court ignored Larson's expressed wishes regarding Looby's not being his guardian and conservator. The court ignored Larson's expressed wishes as to who his attorneys of record should be. The court refused to allow Larson to dismiss Wilson, despite the fact that Wilson had long since ceased to advocate for her client's expressed desires or to pursue Larson's right to an evidentiary hearing. Instead, the court allowed Looby, for an extended period of time, almost unlimited powers as temporary guardian and conservator over Larson's personal liberty and his financial affairs.
>
> The court continued: [Pet. Ap. at 24a-25a.]
>
> [T]he appropriate disposition of this appeal is to remand the cause to the trial court with directions to expedite an evidentiary hearing on Larson's competency and what permanent arrangements, *if any*, are necessary to protect Larson if he is shown to be incapacitated. In the meantime, the court is

> *directed* to limit Looby's authority as guardian and conservator to those powers necessary to address the emergency alleged to exist in the petition that resulted in his appointment. *Until Larson is determined to be incapacitated, we further direct the court to honor his election as to whom he wishes to represent him.*

In re Larson, 270 Neb. at 853-56 Pet. App.at 25a (emphasis added).

Despite the Nebraska Supreme Court's January 2006 order, after remand the Probate Court neither identified an "emergency" or limited Looby's powers to those necessary to address the "emergency."

In addition to the Probate Court's clear violation of Neb. Rev. Stat. § 30-2626, the Probate Court disregarded other laws intended to protect allegedly incapacitated citizens. The court simply ignored their existence of valid powers of attorney that would have required Joe Toman's appointment as guardian/conservator.

The Probate Court also ignored the terms of Neb. Rev. Stat. § 30-2627 which require that a guardian/conservator should respect the wishes of the ward. The guardian is also to use the *least restrictive means of caring for the ward.* Neb. Rev. Stat. § 30-2628(1)(1). Here, the GAL knew Larson did not like Looby and did not want him as guardian. Ms. Prokupek knew her father did not like or trust Looby. Larson made it clear to the court by his own personal statements that he did not want Looby as his guardian. There is no logical reason for the court's dogged determination that Looby remain as guardian despite Larson's expressed wishes.

Perhaps the most egregious failing of the Probate Court was her failure to treat Larson with the smallest measure of respect. The Declaration of Independence which provides the firm foundation for our legal system contains one phrase, quoted above all others and incorporated into the Constitution, providing protection for individual liberties. That phrase says:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

Declaration of Independence signed July 4, 1776.

At a bare minimum, a representative of the judicial branch should treat litigants with respect and dignity unless the litigant has forfeited such right by his or her conduct. Larson was not a criminal to be sentenced. Larson was a law-abiding citizen who had spent his life working hard as a farmer, respecting the law and paying taxes. Larson's only "crime" was to become old and need medical care. The Probate Court treated Larson with total contempt. The Court refused to listen to Larson's reasons for not wanting Looby as guardian. The court interrupted one hearing to personally testify on the record that Larson had fallen asleep during a lengthy and boring review of exhibits. On another occasion the judge demanded Larson's guardian testify on the record, in detail, that Larson had experienced incidents of fecal incontinence. Some of these exchanges are set out in Pet. Ap.beginning at 67a.

(2) Refusing to Allow Larson to Pay Attorneys and Hire Experts. This Court has already determined that in criminal matters, an individual must be afforded the right to representation by counsel. This is such an important right that if the defendant cannot hire his own counsel, the state will pay for the defendant's representation.

Neb. Rev. Stat. § 30-2625(c) gives the subject of a petition alleging incapacity the right to counsel, to introduce evidence, and to appeal a finding of incapacity. *Id.*

After the directions of the Nebraska Supreme Court to allow Larson's counsel of choice to appear, the Probate Court could no longer prevent their participation in the suit. The court, however, could refuse to allow them to be paid. It is also apparent that the court determined that the proceedings could be resolved more quickly if Larson had no expert witness to appear on his behalf. Larson's attorneys were finally able to persuade the court to allow a small amount for an expert to examine Larson to determine capacity on Larson's behalf.

Larson's attorneys continued to raise the issue of fees to the Probate Court because it was apparent the Probate Court was refusing fees to force them to withdraw. In addition, the time required by the three attorneys for Larson who all practice in small or solo law firms precluded their ability to work on other cases.

Despite his treatment by the Probate Court and all he had been through, Larson was adamant that he wanted to appeal the determination that he was incapacitated and that Looby should remain as his guardian/conservator.

After the Probate Court issued its November 27, 2006 order, Larson's attorneys filed a timely notice of appeal. Larson's counsel then ascertained the cost of preparing the appellate record. Largely because the evidentiary hearing had been conducted over nine months and on at least 39 separate dates, the record was quite expensive. Larson's guardian/conservator refused to pay for preparation of an appellate record.

Because Looby refused to pay for the record, Larson was basically destitute. Larson's only hope for an appeal was to ask the Probate Court to either order the conservator to pay for the trial transcript or to allow Larson to proceed *in forma pauperis*. The Probate Court refused to do either. Absent a record, Larson was deprived of his right to appeal. Larson, therefore, appealed the Probate Court's refusal to allow him to proceed *in forma pauperis*. This appeal had been fully briefed and oral argument was scheduled when Larson died.

The failure of the Nebraska Probate Court to properly apply the Nebraska statutes deprived Larson of rights guaranteed by the Fourteenth Amendment to the Constitution as well as the Nebraska Probate Code.

(3) Conflict of Law Firm Representing Both Petitioner and Guardian/Conservator. This issue was raised near the beginning of these proceedings and several times thereafter, but the court refused to even consider the issue. Larson's attorneys attempted to raise the issue in Larson I, but the Nebraska Supreme Court did not address the issue for procedural reasons.

The conflict issue was raised again to the Probate Court after the Nebraska Supreme Court's remand of the case. The Probate Court failed to rule on the conflict issue. Larson attempted to raise this issue with a writ to the Nebraska Supreme Court. The Court denied the writ. Larson's attorneys also raised the issue in their appeal of the Probate Court's refusal to reconsider awarding attorneys fees but the issue was never addressed.

ARGUMENT AND AUTHORITY

I. DEPRIVATION OF CONSTITUTIONAL RIGHTS AND EQUAL PROTECTION OF THE LAWS

A. Neb. Rev. Stat. § 30-2626.

Neb. Rev. Stat. § 30-2626 allows a temporary guardian/conservator to be appointed during an *ex parte* hearing. The statute states that such a temporary order can only be issued if it is necessary because of an emergency and that the powers of the temporary guardian/conservator be limited to the powers necessary to remedy the emergency situation. The statute, however, does not contain any guidelines for what would constitute an emergency. The statute also does not include any requirement that a party seeking an *ex parte* order inform the court if there are persons who fit into any of the categories of those who have priority as appointment of guardian or conservator under Neb. Rev. Stat. § 30-2627.

If a 90-day temporary appointment of guardian/conservator is granted, the appointment may only be extended for "good cause shown." The statute however, contains no definition of what would constitute good cause. The statute also does not require a record of any evidence or assertions to support the "emergency" or "good cause." The statute, therefore, confers unlimited and unreviewable discretion on the probate judge to decide both "emergency" and "good cause," and the evidence required.

In the present case, it is easy to see how the unfettered discretion of the Probate Court could result in misuse of the "temporary" appointment allowed by Neb. Rev. Stat. § 30-2626. In the present case, Larson was deprived of control or use of his assets, his right to choose his residence, his ability to come and go as he pleased, his ability to decide who he would see or talk with, and his ability to manage his financial affairs. This case shows the magnitude of the abuse of power made possible by this statute.

B. Equal Protection Under the Laws

1. Failure to Enforce Sect. 30-2628(c).

Each individual is entitled to be treated the same as any other individual in the application of a law. United States Constitution, Fourteenth Amendment. Neb. Rev. Stat. § 30-2628(c) requires a temporary guardian respect "the decision making authority of an Attorney in Fact . . . pursuant to a Power of Attorney for Health Care." Despite this clear instruction, the Probate Court refused to recognize the existence of Larson's existing general power of attorney and power of attorney for health care

A court does not have discretion in choosing whether to enforce a statutory command unless the statute confers such discretion. *See Texas Office of Public Utility Counsel v. F.C.C.*,183 F.3d 393, 418 (5th Cir. 1999) ("Generally speaking, courts have read 'shall' as a more direct statutory command than words such as 'should' and 'may.'")(citation omitted); *MCI Telecomm. Corp. v. F.C.C.*, 765 F.2d 1186, 1191 (D.C. Cir. 1985) ("'Shall,' the Supreme Court has stated, 'is the language of command,' *Escoe v Zerbst*, 295 U.S. 490, 493, 55 S.Ct. 818, 820, 79 L.Ed. 1566 (1935); '[a]bsent a clearly expressed legislative intention to the contrary,' courts ordinarily regard such statutory language as conclusive.") (citing *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 477 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980) and *Amalgamated Transit Union v. Donovan*, 767 F.2d 939, 944 (D.C. Cir. 1985)). The Probate Court clearly erred.

2. Respect Ward's Wishes

If there is one clear fact in this entire record, it is that Larson did not want Looby as Larson's guardian/conservator. Larson told this to his attorneys, his daughter, the opposing attorneys and attempted to tell the court. Nebraska law requires that the ward's wishes are to be taken into account. Neb. Rev. Stat. § 30-2627(c).

Larson's wishes, however, were not only ignored by everyone except Badura, Cullan, and Meisinger, the other parties spent nearly all of Larson's estate to keep him from choosing his guardian and his attorney.

II. LARSON SHOULD HAVE BEEN ALLOWED TO USE HIS FUNDS TO PROTECT HIS INTERESTS.

A. Right to Counsel.

1. Choosing Counsel is a Basic Right.

Failure to provide adequate due process to the subject of a petition seeking a declaration of incapacity violates nearly every fundamental right in the United States Constitution. As explained by the Oklahoma Supreme Court in a similar case:

> The United States Supreme Court and this court have both held that the state's participation in any proceeding, the result of which may be the significant restriction of a person's liberty, requires that the person be afforded the protections of due process. A constitutionally unassailable guardianship proceeding must therefore include proper written notice, a hearing at which the prospective ward may appear and present evidence, the opportunity to confront and cross-examine adverse witnesses, a neutral decision-maker, *representation by counsel*, findings meeting a clear and convincing evidence standard, and a record sufficient to permit meaningful appellate review.

Towne v. Hubbard, 3 P.3d 154 (Okl. 2000) (citations omitted, emphasis in original). *See also Doe v. Rowe*, 156 F.Supp. 2d 35, 48-51 (D. Me. 2001) (finding Maine statute disenfranchising individuals under guardianship by reason of mental illness violated due process because of lack of notice and opportunity for hearing); *Grant v. Johnson*, 757 F.Supp. 1127, 1132 (D. Or. 1991) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of their liberty within the meaning of the due process clause of the fifth and fourteenth amendments. Therefore, a person has a substantial liberty interest in avoiding mental hospitalization. The emergency guardianship procedure set forth in O.R.S. 126.133 contemplates restraints on the liberty of alleged incapacitated persons and, therefore, the due process protections under the Fifth and Fourteenth Amendments to the United States Constitution must be afforded to those persons.") (citations omitted).

The Superior Court for Pennsylvania recently discussed the dangers that can result from misuse of procedures meant to assist incapacitated persons. The Court said:

> The dangers of the incompetency statute have been recognized since its inception. *In re: Bryden's Estate*, 211 Pa. 33, 633, 61 A. 250 (1905) (statute allowing for declaration of incompetency is a dangerous statute and is "to be administered by the courts with the utmost caution and conservatism.")

In re: Estate of Rosengarten, 871 A.2d 1249 (Pa. Sup. 2005).

According to the Pennsylvania Court, "the basic principle involved . . . is that a man may do what he pleases with his personal estate during his life." *Id., citing Lines v. Lines*, 142 Pa. 149, 21 A. 809 (Pa. 1891). As recognized by the Court in Pennsylvania and embodied in the laws and regulations of both federal and state governments, there are no rights more important to American jurisprudence than those basic rights set out in the Declaration of Independence. *See, e.g., Hayes v. Crutcher*, 108 F. Supp. 582, 585 (D. Tenn. 1952) ("The force of the law is set against oppression and exploitation. It is a fundamental principal of Western civilization that man is sacred to man. The degradation of any man by the denial of his inalienable rights is an assault upon humankind. Roman and Anglo-American jurisprudence is replete with fundamental principles which courts of law recognize and enforce in order to preserve the dignity and sanctity of human nature. Our Declaration of Independence and our Constitution recognized these principles and provided that government itself should be subject to them.").

Actions to appoint a guardian/conservator to take control of another person's life and property implicate each of the crucial rights embodied in the Declaration. According to the Pennsylvania courts:

> [T]he incompetency statute 'places a great power in the court.' The court has the power to place total control of a person's affairs in the hands of another. This great power creates the opportunity for great abuse.

In re: Rosengarten, 871 A.2d at 1254.

Case law provides numerous examples of guardians and conservators abusing their powers. For example, the United States Court of Appeals for the Tenth Circuit determined it was an abuse of state guardianship and conservatorship statutes to obtain court protection for religious deprogramming of an adult who does not show any evidence of insanity in *Taylor v. Gilmartin,* 686 F.2d 1346 (10th Cir. 1982). *See also In re Pickering,* 182 B.R. 268 (Bankr. D. Mont. 1995) (conservator acted in bad faith and breached fiduciary duties by using conservatorship property as his own); *Project Release v. Prevost,* 722 F.2d 960, 978 n.21 (2nd Cir.1983) (noting that courts have inherent power to prevent guardians' abuses or mistakes).

In its opinion in *In re: Estate of Rosengarten, supra* the Pennsylvania Superior Court chastised the lower court for engaging in much of the same conduct that occurred in Larson's case. The Court said:

> [T]he orphans' court has asserted that Ms. Rosengarten cannot be represented by her counsel of choice, has indicated that she has no right to challenge the disposition of assets that she owns, has delayed a hearing on her capacity when that hearing is statutorily-mandated to be held promptly, and failed even to examine facially meritorious allegations that the guardian was violating her duty to act in Ms. Rosengarten's best interest by charging excessive and unwarranted fees. The handling of this matter flies in the face of the fundamental precepts and goals of the . . . Code relating to incapacitated persons.

In re: Estate of Rosengarten, 871 A.2d at 1257. *See also Mazza v. Pechacek,* 233 F.2d 666, 666-666-67 (DC. Cir. 1956) (acknowledging that under the laws of the District of Columbia, persons for whom a conservator is sought has the right to select private counsel of their own choosing to advocate their position).

2. Ability to Pay Counsel is Necessary to Protect the Right.

One of the most basic tenets of American jurisprudence is that there is no right unless there is a remedy. *Marbury v. Madison,* 5 U.S. 137 (1803). The Nebraska statutes guarantee a right to select and retain your own counsel to contest an allegation of incapacity. If the Probate Court can arbitrarily decide whether to recognize counsel or refuse to pay the allegedly incapacitated person's selected counsel with funds from the estate of the supposedly "incapacitated" person, there is no effective mechanism to protect the right to counsel in such cases.

The law relating to the necessity of counsel in criminal proceedings is well established. *See Gideon v. Wainwright,* 372 U.S. 335 (1963). The right to representation in a criminal proceeding which could result in loss of liberty is so important, each state now employs a system of "public defenders" to provide representation to those charged with a crime who cannot afford private counsel. *See,* Neb. Rev. Stat. § 23-3401, et seq.

A determination that an individual is "incapacitated" has an even greater impact on a citizen's life, liberty and property than a felony conviction. Although a state may determine where a prisoner will be housed and take control of his or her daily activities while the criminal serves his or her sentence, if the prisoner has assets which are not used to make restitution, the prisoner can appoint a manager of those assets and direct how they are handled, leave the assets in a bank or gift the funds to a person of his or her choosing.

If a guardian/conservator is appointed, however, the ward loses all control over where he or she will live, who is allowed to visit, what expenses will be paid out of his or her funds and every other decision of the ward's life. *See, e.g., Stewart v. Keyes*, 295 U.S. 403, 414, 55 S.Ct. 807, 811 (1935) (noting that "as a general rule, a guardianship carries with it exclusive power to direct the guardian and to supervise the management and disposal of the ward's property."); *Brisacher v. Tracy-Collins Trust Co.*, 277 F.2d 519, 521 (10th Cir. 1960) ("It is of course fundamental that a ward is not free to deal with his property when under the shelter of a valid and existing guardianship. Such indeed is the very purpose of the guardianship and were the rule otherwise the guardian could neither execute his trust nor could third persons rely upon the authority of the guardian."). The guardian and/or conservator is supposed to take the ward's wishes into consideration and utilize the least restrictive means to properly care for the ward. Neb. Rev. Stat. § 30-2628. If the ward cannot be represented by counsel advocating for the ward, however, the ward may be unable to communicate his or her wishes to the guardian or be prevented from presenting his or her preferences to the court. Without effective legal representation, a ward is at the mercy of his or her guardian even if the guardian intentionally disregards the preferences of the ward.

Because of the total deprivation of rights resulting from a finding that a person is "incapacitated," the state must insure that protections adequate to protect the person's rights are in place. As explained by the Florida Appellate Court:

> [W]hen the state takes away "a person's right to personal freedom, minimal due process requires proper written notice and a hearing at which the alleged incompetent may appear to present evidence in his/her own behalf." Other factors such as the opportunity to confront and cross-examine adverse witnesses before a neutral decision-maker, representation by counsel, findings by a preponderance of the evidence, and a record sufficient to permit meaningful appellate review are concomitant rights in this context that are also required and cannot be abridged without compliance with due process of law . . .
>
> [G]uardianship proceedings must comport with constitutional notions of substantial justice and fair play.

Joan L. O'Sullivan, "Role of the Attorney for the Alleged Incapacitated Person," 31 Stetson L. Rev. 687, 702, 706 (2002). *See also Grant*, 757 F. Supp. At 1132 (determining that guardianship proceedings implicate due process).

3. Heightened Scrutiny Should be Used If the Ward and Guardian are in Conflict

Courts should be particularly diligent in protecting the ward's interests if there is a conflict between the ward and the guardian. *See Guardianship of Zaltman*, 65 Mass. App. Ct. 678, 843 N.E.2d 663 (2006); *Ottawa Tribe v. U.S.*, 166 Ct. Cl. 373 (Ct. Cl. 1964) ("The law frowns upon anything that bears any semblance to a conflict of interest. This is especially true where there is a trust relationship. The law is even more exacting where there is a relationship akin to that of guardian and ward. That no man can serve two masters is gospel as well as law. It is true in life as in law. There can be no halfway ground."). In a case very similar to the Larson case, a ward wished to challenge the continuation of her guardianship, asserting that she had regained sufficient faculties to manage her own affairs. The Court refused to recognize counsel retained by the ward, instead allowing the attorney who was appointed to represent the ward in the original proceeding to appear as the ward's attorney. The ward's chosen counsel was not allowed to participate in the action despite the fact that the ward had retained the counsel and the ward's former attorney was acting contrary to the ward's directions. *Id.* 65 Mass App. at 682-84, 843 N.E.2d at 666-68. The Appellate Court found that the lower court had made "fundamental" errors in granting a motion to strike the appearance of the ward's retained counsel without an evidentiary hearing. *Id.* The Court then addressed the other errors of the lower court. The Appellate Court said:

> [A] judge has an obligation that was not here discharged, that of personally ascertaining the ward's desires and intentions. . . . "Even if the ward lacked the capacity to make [her own] treatment decisions at the time, [her] expressed preference 'must be treated as a critical factor in the determination of [her] "best interests,"' . . . since it is the patient's true desire that the court must ascertain."

* * *

> A third fundamental flaw was that the judge's approach . . . appeared to assume that the ward's condition was fixed and unchanging, notwithstanding the facts that there had been no periodic review of the substituted judgment and treatment plan orders (which should have been ordered but was not) . . .

Guardianship of Zaltman, 65 Mass App. at 685-86, 843 N.E.2d at 668-69. *See also Messier v. Southbury Training School*, 562 F. Supp. 2d 294, 336 (D. Conn. 2008) (noting that "the power of guardians to make decisions affecting their wards' treatment does not excuse the [guardians'] failure to make community placement available or their failure to exercise professional judgment in the overwhelming majority of cases. Guardianship does not completely divest a mentally retarded individual of the right to participate in decisions." The court's duty to protect the ward's interest is especially pronounced because "[a]fter appointing a guardian ad litem, a court maintains a continuing obligation to supervise the guardian ad litem's work." *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 652 (2nd Cir. 1999).

B. Right to Appeal

If an individual is deprived of his or her right to appeal an adverse judgment, that individual has not been afforded his or her full rights under the law. *State ex rel. City of Grand Island v. Tillman*, 174 Neb. 23, 29, 115 N.W.2d 796, 801 (1962). A right to appeal an adjudication of incapacity is guaranteed by law. Neb. Rev. Stat. § 30-2620(9); *In re Estate of Thompson*, 186 Ill. App. 3d 874, 542 N.E.2d 949, 134 Ill.Dec. 603 (1989). "The view has been taken that, under a statute providing for appeals from judgments generally, an appeal lies from a judgment or decree in a proceeding to restore a person to competency, even in the absence of any specific provision for an appeal in restoration proceedings." *Right of Appeal in Proceeding* *for Restoration to Competency*, 122 A.L.R. 541 (West 2009). As discussed previously, however, without an appellate record there can be no appeal.

The county court based its clearly punitive decision to refuse Larson the right to proceed *in forma pauperis* on a misreading of the Nebraska law which is intended to confer a broad right to proceed *in forma pauperis.*

The County Court ostensibly refused to allow Larson to proceed *in forma pauperis* because Neb. Rev. Stat. § 25-2301 does not apply in probate proceedings. This ruling by the Probate Court is yet another unequal application of Nebraska's law. Although at this point Larson's right to appeal by proceeding *in forma pauperis* cannot be restored.

According to the Nebraska Probate Court, "the statutory authority [relied on by Larson] does not mention in any fashion any matters filed or heard pursuant to the Nebraska Probate Code. . . . [and] the Nebraska Probate Code has specific statutory language for appellate procedures, none of which mention the allowance for an *in forma pauperis* proceeding. Neb. Rev. Stat. § 30-1601.
[Jan. 17 Ord. P.2.] The Probate Court then announced his unique conclusion that a "probate" case is neither "civil or criminal" and, therefore, proceeding *in forma pauperis* is not allowed.

Even if the county court's assertion that a probate case is neither a civil (or criminal) action was correct, Neb. Rev. Stat. § 25-2301 is not limited to "civil" and "criminal" cases. The statute establishing the matters in which *in forma pauperis* is intended to be construed in the broadest possible terms. The applicable statute provides as follows:

> For purposes of sections 25-2301 to 25-2310:
> (1) Case includes *any* suit, action, or proceeding.

> (2) In forma pauperis means the permission given by the court for a party to proceed without prepayment of fees and costs or security.

Neb. Rev. Stat. § 25-2301 (emphasis added).

Had the County Court reviewed the statutory language prior to reaching its conclusion, there is no way the court could have held that probate cases are excluded from the legislature's instructions that proceedings *in forma pauperis* be available in "*any* suit, action, or proceeding." The County Court's "error" in misreading the language of Neb. Rev. Stat. § 25-2301 is yet another way in which Larson was deprived of his rights.

In the present case, the court arbitrarily denied Larson his right to appeal by allowing Larson's guardian/conservator to withhold funds necessary to prepare an appellate record. The Probate Court not only ratified the actions of the guardian/conservator in refusing funds for a record, the court justified its refusal to allow Larson to appeal on the fact that Larson's estate had been so depleted by payments made to *counsel for the Petitioner and other persons opposing Larson's expressed wishes* that the Court had to deny fees to Larson's attorneys and refuse to allow payment for an appellate record.

III. FITZGERALD SCHORR LAW FIRM HAD A CONFLICT REQUIRING DISGORGEMENT OF FEES.

A. A Serious Conflict Existed.

Proceedings to have an individual declared incapacitated are intended to benefit, not punish, the allegedly incapacitated person. *Goldfine v. U.S.*, 300 F.2d 260, 263 (1st Cir. 1962) ("Guardianship... is an ultimate matter, the sole object of which is the 'benefit or advantage of the ward.'") (citations omitted); *In re Guardianship of Danny Holly,* 164 P.3d 137, 146 (Okl. 2007). As the Oklahoma Supreme Court stated in the above case:

> We remind the parties and the district court that guardianship proceedings are conducted for the benefit of the ward, not for the convenience of the court, the attorneys, or the guardians.

Id.

In an action to appoint a guardian or conservator, the Petitioner bears the burden to prove by clear and convincing evidence that the subject of the proceeding needs a guardian to make personal decisions and/or a conservator to manage the subject's financial affairs. The role of the Petitioner, therefore, is inherently adverse to the interests of the allegedly incapacitated person.

The guardian, however, is to act in the best interests of the ward. An individual serving as either guardian or conservator is a fiduciary who is held to the same standards in relation to a ward as a trustee has in relation to the beneficiary of a trust. *See, Eagen by Keith v. Jackson,* 855 F.Supp. 765, 779 (E.D. Pa. 1994) ("It is beyond peradventure that a guardian may not place himself or herself in a position where his or her interests conflict with those of the ward. As the New Jersey Supreme Court held in analyzing the similar fiduciary relationship that exists between a trustee and a beneficiary, 'the most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty and he is not permitted to place himself in a position where it would be for his own benefit to violate that duty.' The duty of loyalty operates as a prophylactic, irrespective of good or bad faith on the part of the guardian.") (citations omitted).

One way to insure a guardian fulfills the fiduciary obligations owed to the ward is to insure that counsel involved in the case do not have a conflict. For example, a Florida Court found that an allegedly incapacitated person was not accorded his right to counsel when his attorney was not appointed in a timely manner and the attorney that was appointed had previously represented the petitioner against the ward. *In re: Fey,* 624 So.2d 770 (Fla. App. 1993). In a case decided after the ward's death because of the "great public interest" in the issue, the Court said:

> [T]he attorney's representation of the Ward during the hearing overlapped with his very evident representation of Vivian Curtis, despite Curtis' argument to the contrary. Vivian Curtis was the original petitioner seeking guardianship of the Ward's person. This was clearly improper . . .

Id., 624 So.2d at 772

Florida law on this subject is well developed. After the decision in *Fey,* the Florida Attorney General was asked for an opinion on the following issue:

> "Does an attorney representing a guardian of a person adjudicated incapacitated and who is compensated from the ward's estate for such services assme a duty to the ward as well as to the guardian?"

The Florida Attorney General reached the following conclusion:

> The relationship between the guardian and the ward is such that the ward must be considered to be the *primary or intended beneficiary* . . . .
>
> Accordingly, I am of the opinion that *as the ward is the intended beneficiary of the guardianship, an attorney who represents a guardian of a person adjudicated incapacitated and who is compensated*

> *from the ward's estate for such services owes a duty of care to the ward* as well as to the guardian.

Florida Attorney General Advisory Legal Opinion No. AGO 96.94, November 20, 1996, Robert A. Butterworth, Attorney General (emphasis added).

A recent Florida Case enunciated the rule of law that should be universally applied. That is that "[A]ny attorney representing the alleged incapacitated person may not serve . . . as counsel for the guardian of the alleged incapacitated person or the petitioner." *Holmes v. Burchett*, 766 So. 3d 387, 389 (Fla. App. 2000),

The conflict between counsel's duties to the guardian and the ward and counsel's duties to the petitioner was clearly demonstrated by Ms. Spahn's closing argument demanding that the Court allow no fees to Larson's counsel.

> Ms. Spahn said. . . . Family is important. The probate code realizes that. Because of other actions outside of Barbara Prokupek's control, Larson developed an unreasonable and unjustifiable anger against his daughter. And – and that has shown itself in here in court. Barbara Prokupek, since we became involved, she's been allowed to restore her relationship with her father and for that, she's extremely grateful. Does he still get upset with her? Yes, he does. But it's typically after he's talked to his lawyer or some friends and she is . . .
>
> Cullan . . . I think this is way beyond any record or appropriate comment.
>
> The Court: Overruled . . .

* * *

The Court: I'm hearing – what I'm hearing is totally related to fees and I want to hear it. Let's keep going.

Ms. Spahn continued: . . . Family is important. Larson's daughter loves him. ***She's*** been denied access to her – his – her dad and we have helped restore that relationship. And we – that relationship should be honored and not mocked by opposing counsel. We should restore and honor family relations and not drive a further wedge between the family. And opposing counsel is not advancing Larson's best interest by driving a wedge between him and his family. He wants his grandchildren and – and he should be afforded the remaining days of his life, to spend time watching his grandchildren's children grow up, his great grandchildren grow up. And they are – they are attempting to deny him that ability by driving a wedge between him and his daughter.

* * *

Ms. Spahn: . . . And really, our fees, we've simply responded to the challenges that came up to protect Larson, to advance the ball in his best interest and to restore him and his family, because to me, that's the most important thing. ***I can't imagine living through what Barb's lived through. I can't imagine it, but that's what we've done.*** And who should pay fees in this case? You know, who should be responsible for all of these attorneys fees? Why should Larson foot the bill for these three attorneys fees in – in light of these pleadings? I think everybody can step back and look at what's happened over the past two years and see who's representing who, who has whose interest at heart and then decide whose money – whose fees Larson should pay for.

Ms. Spahn's argument demonstrates the impropriety of her representation in disregard of the conflict between Looby and Ms. Prokupek. Ms. Spahn's argument focuses exclusively on the interests of Ms. Prokupek. Spahn admits that Mr. Larson remained unhappy with the situation and angry at his daughter, the petitioner. It is also somewhat disingenuous for Ms. Spahn to blame Mr. Larson's counsel for the fees incurred since approximately $75,000 in fees had been requested by the attorneys representing the petitioner and guardian before Larson's attorneys were allowed to enter their appearance.

B. Fees Must be Disgorged

According to the Nebraska Supreme Court, if an attorney has a conflict in interest he or she is not entitled to any fee. *State ex rel. Special Counsel for Discipline v. Shapiro,* 266 Neb. 328, 665 N.W.2d 615 (2003).

In this case the Fitzgerald Schorr law firm was allowed to represent Larson's guardian as well as the Petitioner advocating Larson's incapacity. The animosity between the parties was evident. This conflict is no less egregious than that addressed by the Florida courts. We cannot in good conscience accept the premise that by representing Looby and Barb Prokupek, the Fitzgerald Schorr firm was representing the best interests of Larson. Mr. Larson and his attorneys expressed Mr. Larson's wishes very clearly. He did not want a guardian, especially if it was Looby.

Therefore, if this Court grants this writ and determines there is a conflict of interest on the party of the law firm, the case will have to be remanded for a determination of what fees should have been paid to that law firm.

CONCLUSION

The facts of this case show that a horrendous injustice was done to Mr. Larson. No one can repair the harm that was done to him. By granting Certiorari and making it clear that state court judges do not have discretion in applying laws implicating core Constitutional rights.

July 21, 2009.

Respectfully submitted,

Diana J. Vogt
(Admission Pending)

APPENDIX

NEBRASKA SUPREME COURT

No. S-05-257

In re Guardianship and Conservatorship of
Everett D. Larson, an alleged incapacitated person.
Barbara L. Prokupek and Wilfred Henry Looby,
Temporary Guardian and Conservator,
Appellees,

v.

Everett D. Larson,
Appellee,

and

Joseph Toman,
Appellant.

Appeal from the County Court for Douglas County:
Jane H. Prochaska, Judge.

Before Hendry, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

McCormack, J.

I. NATURE OF CASE

This case presents an appeal from an interlocutory order made by the county court during guardianship and conservatorship proceedings for an alleged incapacitated person.

II. BACKGROUND

On August 3, 2004, Barbara L. Prokupek, a child of Everett D. Larson, filed a petition for the appointment of a temporary guardian and conservator and a permanent guardian and conservator in the county court. The petition alleged that Larson was suffering from dementia and early onset Alzheimer's disease and was no longer able to make appropriate medical and financial decisions for himself. The petition alleged that Larson presently had no guardian or conservator, that an emergency existed because his doctors needed someone in place to make appropriate medical decisions, and that Larson needed someone to take care of his financial dealings. The petition suggested Wilfred Henry Looby as a suitable and proper person to act as the temporary guardian.

That same date, the county court issued an order appointing Looby as the temporary guardian of Larson, authorized and empowered to take possession of and have the care and management of the estate, subject only to the limitation that Looby not pay compensation to himself or his attorney from Larson's assets or sell real property of the estate without a court order. The appointment was to continue until further order of the court. Larson was sent a notice of hearing for the petition for appointment of a guardian and conservator, stating that a temporary guardian had been appointed for Larson and that a hearing was to be held as to the appointment of a permanent guardian on September 22. The notice set forth, inter alia, Larson's right to have an attorney appointed to represent him, right to present evidence on his behalf and compel the attendance of witnesses; right to have the powers of the guardian and/or conservator limited by the court; and right to appeal any final order.

No hearing was held on September 22, 2004, as to the appointment of a permanent guardian. On September 22, Larson, by and through his attorney, Mary L. Wilson, filed an objection to the petition. The objection stated that Larson objected to the proposed appointment of any guardian and conservator but that if such a guardian and conservator were required by the court, he requested he be allowed to choose the person so appointed. This objection was apparently never ruled upon or pursued by Wilson for a ruling.

That same date, Looby filed with the county court an application for appointment of a guardian ad litem (GAL) and motion for continuance, referring to Larson's objection and stating that all interested parties appeared to agree to the necessity of a GAL. There does not appear on the record any stipulation as to a continuance of the hearing on the petition.

The county court issued an order appointing a GAL for Larson. The GAL was ordered to investigate the matter and file a report with the court no later than 48 hours prior to the next hearing regarding the appointment of a permanent guardian and conservator for Larson. Without any specific findings, the court also ordered that the authority of the temporary guardian and conservator should continue until further order.

In the GAL's report, she stated that the medical records showed a diagnosis of dementia and Larson's inability to care for himself. The GAL described that about 1 1/2 years before the current petition to appoint a guardian and conservator, a petition for the appointment of a guardian and conservator was filed in Cass County, pursuant to the recommendation of Larson's doctor at that time. Prokupek was assigned as the temporary guardian and conservator for approximately 2 months, but there was an objection to the petition, and the matter was resolved when Looby was appointed, as per Larson's agreement, as Larson's attorney in fact pursuant to a durable power of attorney. This power of attorney was apparently revoked by Larson without notice to anyone, and another attorney in fact was named, Joseph Toman. In approximately November 2003, around the time that Larson appointed Toman as his attorney in fact, Larson deeded 100 acres of his farmland to Toman.

The GAL stated that during her interview with Larson, it appeared at first that he knew what was going on and that he remembered a lot about the general state of his resources and farming; however, she stated that after talking with him longer, he repeated the same things over and over again. Larson expressed anger toward his son and Prokupek, accusing them of being "greedy" and ignoring him. Larson explained that he gave the 100 acres to Toman to keep it from his greedy children.

The GAL reported that Larson was aware that the guardianship action was occurring and admitted he could no longer live alone and had no objection to the appointment of a guardian. However, Larson wished to choose one of his friends as his guardian and conservator. Larson described Looby as a "crook." However, the GAL stated her opinion that Looby was carrying out his fiduciary duties according to the law and consistent with what was in Larson's best interests. Wilson was also interviewed by the GAL, and Wilson allegedly stated that she believed that Prokupek, as a beneficiary, should have a say in the management of Larson's affairs and that Prokupek wished Looby to continue as guardian.

The GAL concluded that Larson lacked the capacity to make any intelligent recommendation as to his choice for a guardian and conservator. The GAL recommended that Looby be appointed as a permanent guardian and conservator, remaining as temporary guardian and conservator until that time; that Toman and the friend Larson had suggested as guardian be restricted from any contact with Larson; and that further investigation be carried out concerning the validity of the transfer of 100 acres to Toman.

On December 3, 2004, an entry of appearance as attorney for Larson was filed by Margaret A. Badura of the law firm David J. Cullan & Associates. On December 14, a motion to show cause, to recognize counsel, and to schedule hearing was filed with the county court by Badura and David J. Cullan of the law firm David J. Cullan & Associates, as well as by Kirk L. Meisinger of the law firm Ginsburg & Meisinger. Badura, Cullan, and Meisinger alleged that Larson had terminated the employment of

Wilson as his attorney, but despite a stated intention of doing so, Wilson had failed to withdraw; that Badura and Meisinger were his current attorneys of choice; and that it was in the best interests of Larson and the efficient administration of justice that Larson's choice of attorneys be honored. Badura, Cullan, and Meisinger requested that Wilson show cause why she should not be directed by the court to withdraw. Meisinger filed an entry of appearance on December 17. On December 22, Wilson filed an application for a court order allowing her to withdraw as attorney of record.

On December 22, 2004, Larson, by and through his attorneys Badura, Cullan, and Meisinger, filed an application for findings and order. The application alleged that under Neb. Rev. Stat. § 30-2626(e) (Cum. Supp. 2004), a temporary order for guardianship shall terminate at the end of 90 days unless a request is filed within the 90-day period and the court extends the temporary guardianship for good cause shown. Similar restrictions for a temporary conservatorship were set forth, citing Neb. Rev. Stat. § 30-2630.01(e) (Cum. Supp. 2004). The application alleged that more than 90 days had elapsed without a request or good cause shown for extending the temporary guardianship or conservatorship. Larson thus prayed for a court order stating that the temporary guardianship and conservatorship had expired and ordering that Looby "cease and desist from acting as or representing himself" to be Larson's temporary guardian and conservator.

The court filed an order on December 22, 2004, scheduling a hearing for January 27, 2005, on Wilson's motion and stating that as Wilson was presently still attorney of record for Larson, it declined to hear Badura, Cullan, and Meisinger's application for findings and order. The court stated that it additionally declined to hear Badura, Cullan, and Meisinger's December 22, 2004, application for findings and order because the record did not reflect the required written notice of hearing to all attorneys of record. The court therefore ordered that no hearing would be held on the application for findings and order unless or until (1) Wilson was allowed leave to withdraw, (2) the application was set for hearing, and (3) notice of such hearing was provided to all attorneys of record.

Looby later filed a motion to restrict assets of the ward wherein Looby asserted that he had reason to believe Larson might withdraw funds in the immediate future in a manner contrary to his best interests. The court granted Looby's motion on December 29, 2004.

That same date, in the district court for Cass County, Looby filed an action against Toman and the Cass County Bank seeking a declaratory judgment that the warranty deed transferring 100 acres of Larson's farmland to Toman was null, void, and wholly without effect. The complaint alleged that the deed was a result of undue influence over Larson, who, at the time of the execution of the deed, was "so weak and unbalanced that he could not understand or comprehend the purport and effect of the execution of the deed."

On January 7, 2005, Wilson filed an application for direction and notice of hearing stating that she had received written notice from Larson requesting that she resign and had prepared the application for withdrawal; however, she subsequently came to question whether her withdrawal would be permissible under the Code of Professional Responsibility. Looby filed a response to this motion and Wilson's original application to withdraw, questioning Larson's mental capacity to dismiss counsel.

Toman entered his first motion with the court on January 10, 2005, by way of a motion to terminate temporary guardianship and dismiss the petition for appointment of temporary guardian and conservator and permanent guardian and conservator. Attached thereto was an alleged power of attorney for health care signed by Larson on November 5, 2003, and appointing Toman. The health care power of attorney stated that Larson authorized Toman "to make health care decisions for me when I am determined to be incapable of making my own health care decisions." Also attached was a durable power of attorney document dated November 5, 2003, designating Douglas Duey as true and lawful attorney in fact and authorizing Duey to handle Larson's financial affairs in numerous respects and to do all other things necessary in connection with a general power to act on Larson's behalf. The document further stated that in the event Larson should become incapacitated to the extent that he were unable to make or communicate responsible decisions concerning his person, then his attorney in fact would have all the power and authority of a guardian as specified in the Nebraska Probate Code. Toman alleged that pursuant to Neb. Rev. Stat. § 30-2620 (Cum. Supp. 2004), the attached powers of attorney showed that the appointment of a temporary guardian and conservator and permanent guardian and conservator for Larson was not the least restrictive alternative available for Larson's continuing care or supervision.

Looby later filed an objection to the motion to terminate temporary guardianship and dismiss the petition for appointment of temporary guardian and conservator and permanent guardian and conservator. Looby asserted that Toman was not an "interested person" as defined by Neb. Rev. Stat. § 30-2209(21) (Cum. Supp. 2004) and furthermore, that Toman had a conflict of interest in serving as a fiduciary for Larson as evidenced by the 100-acre land transfer to Toman.

Badura and Meisinger filed a request for expedited hearing regarding entry of appearance of counsel for Larson. The request set forth the allegations previously made in the motion to show cause and recognize counsel and made the further allegation that Larson had stated he felt like he was "in prison" and wished to be allowed to communicate fully and freely with Badura and Meisinger, as his attorneys. Attached to the request were two affidavits. First, the affidavit of Ronald D. Svoboda, attorney at law, was presented, wherein Svoboda testified that he had first met Larson on September 30, 2003, to discuss estate planning. Svoboda stated that after "several telephone calls and office consultations," in November 2003, he prepared on Larson's behalf a last will and testament, durable power of attorney, revocation of a prior durable power of attorney, and other documents. Svoboda stated that during all the discussions he had with Larson between September 30 and November 11, Larson appeared competent to execute all the documents that he had signed at that time. The other affidavit attached to Badura and Meisinger's request was that of a man who testified that he had known Larson for many years as a neighbor; that Larson appeared competent; and that as of December 2 or 3, 2004, Larson had been moved to a different room at a nursing home where his new roommate was nonconversant and where no one was allowed to visit Larson without being first cleared by Prokupek. The request asked that the court enter Badura and Meisinger as attorneys for Larson forthwith and that they be allowed as his attorneys to freely communicate with Larson without interference or impediment.

On January 11, 2005, there was a hearing in the county court on Badura, Cullan, and Meisinger's motion to show cause and recognize counsel. Also discussed was Toman's motion to terminate temporary guardianship and dismiss the petition for appointment of temporary guardian and conservator and permanent guardian and conservator. Present at court were Larson, Looby and his two attorneys, the GAL, Badura, Cullan, Meisinger, Toman's attorney, Prokupek, the ombudsman with the Eastern Nebraska Office on Aging, and the state's long-term care ombudsman. Wilson left early due to a scheduling conflict and was not present during the hearing. Neither Duey nor counsel representing him was present.

At this nonevidentiary hearing, Prokupek described the "appalling" amount of money being expended from Larson's estate to support eight attorneys and the fact that Badura, Cullan, and Meisinger had, for 24 hours, without notifying her where he was, removed Larson from the nursing home where he was staying. Speaking half to the court and half to Larson, she described that Larson was being dragged in and out of nursing homes and to court hearings and that he did not even know why he was there. Larson responded directly to Prokupek that he did "know what they're trying to do." Larson was then asked by the court why he thought he was there, to which Larson responded that he was trying to protect his property and that it was his and not Prokupek's. Larson was able to identify Badura and Meisinger by name as two out of the three lawyers he stated that he wished to have represent him, explaining that he had known Meisinger "about all of [Meisinger's] life."

The court repeatedly refused to address any concerns expressed by Badura, Cullan, or Meisinger as to Larson's care, directing them to report any concerns to the GAL and to Looby. When Cullan stated that he wished Larson to be assessed by a health care professional, the court responded that Cullan had no standing because he was not an attorney of record and that he would need Looby's permission for any assessment.

When Cullan expressed his concern that Looby's 90-day tenure as temporary guardian had not validly been extended, the court summarily stated that Looby should continue as temporary guardian and conservator because it was in Larson's best interests that he so continue. Cullan interjected that he did not believe that good cause had been properly shown, to which the court summarily replied that in the court's opinion, it had.

In an order filed January 18, 2005, the county court specifically overruled Badura, Cullan, and Meisinger's motion to show cause and recognize counsel. The court stated that it had no authority to direct Wilson to withdraw as Larson's attorney, that Wilson would remain as Larson's attorney until further court order, that Looby would remain as temporary guardian and conservator until further court order, and that Larson was to remain a resident at his present nursing home until further court order.

On January 14, 2005, Toman filed a motion to recuse the county court judge for the reason that a conflict of interest existed. The attached affidavit of D.C. Bradford, attorney for Toman, stated therein that Bradford represented the plaintiff in an action against a partnership in which the judge's husband held a partnership interest and was the managing partner. Bradford also testified that he represented the Omaha Housing Authority in an ongoing dispute with a company of which the judge's husband was the president, treasurer, director, and a shareholder.

The GAL filed another interim report, wherein she stated that she "absolutely and vehemently" opposed Badura, Cullan, and Meisinger's request to be appointed as counsel and describing various actions by these attorneys which she believed were contrary to Larson's best interests. Attached to the report were numerous medical reports and evaluations of Larson to support her conclusion that Larson was incapacitated. Badura, Cullan, and Meisinger filed an objection to the interim report and updated report of the GAL and a motion, praying that the interim report and updated report be struck from the record.

Another nonevidentiary hearing was held on January 27, 2005, on Wilson's motion to withdraw and her later motion for direction, on Looby's motion insofar as it related to the request to permanently restrict funds, on Toman's motion to terminate temporary guardianship, and on Toman's motion to recuse. Also addressed was Badura, Cullan, and Meisinger's request for expedited hearing and entry of appearance. While the court first opined that its prior ruling as to the motion to recognize counsel had rendered the request moot, Cullan interjected that it was his understanding that the request had been held in abeyance until a determination as to Wilson's request to withdraw was made. The court, upon finding no ruling in its records, stated that perhaps it still needed to rule on the motion.

The court concluded that Toman was not an interested party, because regardless of any power of attorney which may or may not exist, the potential conflict of interest resulting from the litigation filed by Looby was "an overriding factor which would substantially overrule any reason why this Court should find . . . Toman to be an interested party." The court also noted the fact that Larson did not remember giving the powers of attorney. To this, Bradford responded that his competency at the time of the grant was relevant and he sought to submit the affidavit of Svoboda, the attorney who prepared the powers of attorney at Larson's request, into evidence. The court rejected the offer for lack of foundation to the effect that Svoboda was an expert in determining mental competency. The court similarly rejected the offer of the affidavit of Bradford regarding the motion to recuse, stating that it did not need to reach this issue due to the determination that Toman lacked standing.

The court was presented with an updated report of the GAL. The court stated:

> I'm marking it as Exhibit 2. Exhibit 2 is received, however for limited purposes of the hearings being heard today not for purposes of -- because obviously if this thing goes to trial eventually on the issue of competency and such then you would need to be

> calling in other witnesses, but for limited purposes of today's hearing . . . .

The court explicitly affirmed that the hearing was not an evidentiary hearing. This updated report largely restated the contents of the other reports outlined above, with more recent observations of Larson's further mental decline and opinions as to how the court should rule on the various motions before it. Attached to this updated report were the two previous reports and all the exhibits attached thereto. The court overruled objections, apparently made by Badura, Cullan, and Meisinger, that the reports were pejorative and inaccurate.

The court overruled Wilson's request to withdraw. The court stated that regardless of what Larson wanted, it was the court's decision whether to allow counsel of record to withdraw. The court explained that if Larson were mentally competent, then he was "playing games with this Court by going through a succession of various attorneys," having spoken to no fewer than four lawyers, which caused delays and increased costs. The court stated that sometimes the court needed to "put the clamps on a client who wants to keep changing lawyers simply to delay matters." If, the court explained, on the other hand, Larson was not competent, then "these lawyers are playing games with . . . Larson and I need to look at . . . Larson's best interest."

At this point, Badura, Cullan, and Meisinger made an oral motion asking the court to allow them to join Wilson as cocounsel. The GAL and counsel for Looby objected, and the court overruled Badura, Cullan, and Meisinger's motion to join as co-counsel. Badura, Cullan, and Meisinger's request for an expedited hearing was summarily overruled because of the court's refusal to allow those parties to be recognized as interested parties. The court's order reflecting these rulings was file stamped February 8, 2005.

A petition by Looby to revoke Toman's medical care power of attorney was filed February 9, 2005. On February 24, Toman filed a notice of appeal from what he described as the court's February 7 order.

On February 25, 2005, a notice of appeal was filed on behalf of Larson "by and through the counsel of his choice," Badura, Cullan, and Meisinger. The notice stated that it was appealing from the county court's January 22 order refusing to allow Larson's attorneys to represent him. On March 1, Badura, Cullan, and Meisinger filed a "Corrected Notice of Intention to Prosecute Appeal," stating that they were appealing from the county court's January 27 order refusing to allow them to appear as attorneys of record.

On April 1, 2005, the county court issued an order suspending Toman and Duey's powers of attorney pending an evidentiary hearing and ordering that Looby was to make all medical and health care decisions for Larson as part of his duties as temporary guardian. The court noted that an emergency existed because those providing medical care to Larson needed to know the proper person to make decisions on his behalf. On April 28, the county court scheduled an evidentiary hearing to be held on July 12 on the petition to revoke medical care power of attorney and on the petition for appointment of a permanent guardian and conservator. The order specifically found that Toman and Duey were interested persons in the guardianship proceedings and petition to revoke medical care power of attorney. It did not list Toman as an interested person in the conservatorship.

III.ASSIGNMENTS OF ERROR

Toman assigns that the county court erred in (1) determining that Toman has no standing, (2) overruling Toman's motion to recuse, (3) overruling Toman's motion to terminate temporary guardianship and dismiss the petition for appointment of temporary guardian and conservator and permanent guardian and conservator, and (4) failing to receive into evidence the affidavits of Bradford and Svoboda.

Badura, Cullan, and Meisinger filed an appellees' brief on behalf of Larson, assigning that the county court erred in (1) not allowing them to enter their appearance and represent Larson and (2) not allowing them to represent Larson as co-counsel with Wilson.

IV. STANDARD OF REVIEW

Statutory interpretation presents a question of law in which an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *See Hall v. City of Omaha*, 266 Neb. 127, 663 N.W.2d 97 (2003).

V. ANALYSIS

1. Toman

(a) Standing

Toman first assigns that the county court erred in determining that he lacked standing. Before addressing the county court's decision to dismiss Toman for lack of standing, we first must determine that the order was in fact a final, appealable order. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken. *Saunders County v. City of Lincoln*, 263 Neb. 170, 638 N.W.2d 824 (2002). The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005).

The court's order of dismissal was made in a special proceeding. Special proceedings include every special civil statutory remedy not encompassed in civil procedure statutes which is not in itself an action. *Id.* We have described an action as any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by statute and ending in a final judgment. Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding. *Id.* Proceedings initiated pursuant to Neb. Rev. Stat. § 30-2619 (Cum. Supp. 2004), to appoint a guardian, and Neb. Rev. Stat. § 30-2633 (Cum. Supp. 2004), to appoint a conservator, are special proceedings. *See Hall v. Hall,* 122 Neb. 228, 239 N.W. 825 (1932).

Having determined that there was a special proceeding, we next consider whether a substantial right was affected. We have stated that a substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken. *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W.2d 368 (1999). Looby asserts that the court's order did not affect a substantial right because under Neb. Rev. Stat. § 30-3420(5)(b) (Reissue 1995), a power of attorney supersedes any guardianship proceedings to the extent that the proceedings involve the right to make health care decisions.

A peremptory denial of permission to file a claim is a final, appealable order. *In re Estate of Emery*, 258 Neb. 789, 606 N.W.2d 750 (2000). In *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989), we held that a right conferred by statute upon persons interested in a decedent's estate to petition the county court to remove the personal representative was a substantial right. Clearly, Toman's asserted right under the probate code to intervene in guardianship and conservatorship proceedings is a substantial right. Toman need not demonstrate the underlying merits as to how he actually falls within the grant of this substantial right in order for its denial to be reviewable as a final, appealable order. Similarly, he need not, as Looby suggests, show that his powers pursuant to the health care power of attorney are in jeopardy.

However, although Toman appealed from a final, appealable order, we ultimately do not address Toman's standing in the guardianship and conservatorship proceedings, because this issue is moot. During oral arguments, Toman explicitly stated that he was not an interested party with regard to the conservatorship. Rather, his only assertion as to standing was with regard to the guardianship. Accordingly, the merits of Toman's standing as to the conservatorship are not before us, as they have been waived. As to the guardianship proceedings, we note that the court issued a later order specifically stating that Toman was an "interested person" as to both the guardianship proceedings and the petition to revoke his medical power of attorney.

A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 690 N.W.2d 166 (2004). Because, after Toman's appeal was perfected, the court issued an order finding that Toman did have standing as to the guardianship proceedings, any dispute in Toman's appeal as to his standing in the guardianship proceedings no longer exists.

(b) Recusal

Toman next asserts that the court erred in denying his motion to recuse. The record reflects, however, that the court never ruled on Toman's motion to recuse. Instead, the court stated that it need not decide the issue because it was rendered moot by its decision as to Toman's lack of standing. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 680 N.W.2d

176 (2004). While the record reflects that the court later determined Toman to have standing, there is no evidence that Toman renewed his motion to recuse. Had he done so, presumably, in accordance with the court's prior rationale, the court would have addressed the merits of Toman's recusal motion. In short, Toman assigns error to a ruling that the court never actually made, having refused to rule on a ground that is no longer pertinent. Under such circumstances, we do not address Toman's assignment of error that the court erred in denying his motion to recuse.

(c) Motion to Dismiss and Svoboda Affidavit

Finally, Toman asserts that the county court erred in failing to grant his motion to dismiss the guardianship and conservatorship proceedings and in failing to receive into evidence the affidavit of Svoboda, the drafting lawyer for Toman's health care power of attorney. These issues were never ruled upon because of the court's determination that Toman lacked standing, nor do they bear upon the correctness of the court's order from which this appeal was taken, the dismissal of Toman for lack of standing. See *State v. Loyd,* 169 Neb. 762, 69 N.W.2d 860 (2005) (our jurisdiction over final, appealable order extends to issues that bear on correctness of that order). As such, these issues are not properly before us in this appeal.

2. BADURA, CULLAN, AND MEISINGER

We next address Badura, Cullan, and Meisinger's purported cross-appeal. Badura, Cullan, and Meisinger filed a "Brief of Appellee Everett D. Larson" with this court. While assignments of error are made, there is no designation of a cross-appeal. In *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999), we refused to address assignments of error in an appellee's brief not designating a cross-appeal. We explained that "the appellate courts of this state have always refused to consider a prayer for affirmative relief where such a claim is raised in a brief designated as that of an appellee" and "have repeatedly indicated that a cross-appeal must be properly designated, pursuant to rule 9D(4), if affirmative relief is to be obtained." *Id.* at 145-46, 602 N.W.2d at 450-51. Neb. Ct. R. of Prac. 9D(4) (rev. 2001) provides:

> Where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the brief of appellant.

Parties wishing to secure appellate review of their claims for relief must be aware of, and abide by, the rules of this court and the Nebraska Court of Appeals in presenting such claims. *In re Interest of Natasha H. & Sierra H.*, *supra*. Any party who fails to properly identify and present its claim does so at its peril. Id. Badura, Cullan, and Meisinger have not complied with the rules of this court, and we therefore do not address their assignments of error.

3. PLAIN ERROR

The issues properly presented by the parties have thus been addressed. However, we note that the record before us raises many concerns with regard to the manner in which the court has conducted its proceedings. Most egregious is the court's failure to hold an evidentiary hearing on Larson's competency during the approximately 8 months of proceedings which took place under a temporary guardianship and conservatorship.

Section 30-2619(b) states that upon the filing of a petition for a finding of incapacity and appointment of a guardian, the court "shall set a date for hearing on the issues of incapacity." Section 30-2619(d) provides:

> The person alleged to be incapacitated is entitled to be present at the hearing in person and to see and hear all evidence bearing upon his or her condition. He or she is entitled to be present by counsel, to compel the attendance of witnesses, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor appointed by the court pursuant to sections 30-2619.01 and 30-2624, and to appeal any final orders or judgments. The issue may be determined at a closed hearing only if the person alleged to be incapacitated or his or her counsel so requests.

Under § 30-2626(a), if an emergency exists, a temporary guardian "to address the emergency" may be appointed by ex parte order of the court "pending notice and hearing." Under § 30-2626(e), the temporary guardianship shall terminate at the end of the 90-day period in which the temporary guardianship is valid, or at any time prior thereto, if the court deems the circumstances leading to the order for temporary guardianship no longer exist, or if an order has been entered as a result of a hearing pursuant to § 30-2619 which has been held during the 90-day period.

Provision is made for the extension of the 90-day period "[f]or good cause shown." § 30-2626(d).

Read together, these statutes provide that an evidentiary hearing should be held expediently on a guardianship or conservatorship petition and that temporary guardians and conservators are intended to exercise their powers in a limited manner and for a limited period of time. We have recognized in guardianship proceedings that a true evidentiary hearing is required to support a finding of incompetency. See *In re Trust of Rosenberg,* 269 Neb. 310, 693 N.W.2d 500 (2005); *In re Guardianship and Conservatorship of Trobough,* 267 Neb. 661, 676 N.W.2d 364 (2004). This rule cannot be circumvented by continuous extensions of a temporary guardianship, nor are numerous reports by a GAL a substitute for an evidentiary hearing.

While § 30-2626(d) does provide that the 90-day temporary guardianship period may be extended for good cause shown, it is hard to imagine what "good cause" could justify a delay of 8 months. Regardless, it cannot be said that the court's summary conclusions as to good cause and its orders extending the temporary guardianship and conservatorship until further court order qualify as a showing of good cause sufficient to circumvent the alleged incapacitated person's right to a speedy resolution of whether, in fact, a need exists to restrict his or her independence to the extent exercised by a temporary guardianship or conservatorship.

Here, Larson has clearly asserted that he is not incapacitated, at least not to the extent asserted by the petition for the appointment of a guardian and conservator. Yet the court, under the advice primarily of the GAL, appears to treat Larson's complete incompetence as a foregone conclusion. Without giving Larson the benefit of an evidentiary hearing to determine competency, the court ignored Larson's expressed wishes regarding Looby's not being his guardian and conservator. The court ignored Larson's expressed wishes as to who his attorneys of record should be. The court refused to allow Larson to dismiss Wilson, despite the fact that Wilson had long since ceased to advocate for her client's expressed desires or to pursue Larson's right to an evidentiary hearing. Instead, the court allowed Looby, for an extended period of time, almost unlimited powers as temporary guardian and conservator over Larson's personal liberty and his financial affairs.

The fact of Looby's extensive powers as temporary guardian and conservator also makes plain the fact that Looby's powers were not, as the statutory scheme mandates, limited to those powers necessary to address an emergency. Under § 30-2626(a), an ex parte order appointing a temporary guardian is allowed only in order to address an emergency, and "[t]he order and letters of temporary guardianship shall specify the powers and duties of the temporary guardian *limiting the powers and duties to those necessary to address the emergency.*'" (Emphasis supplied.) Likewise, § 30-2630.01(a) states that a temporary conservator may be appointed "to address the emergency." Here, the reference made to an "emergency" in Prokupek's petition was the need for the doctors to have someone in place to make appropriate medical decisions. The petition also stated that Larson needed someone to take care of his financial dealings, although it failed to describe to what extent such dealings constituted an emergency.

In *Becker v. Rogers*, 235 Ark. 603, 361 S.W.2d 262 (1962), the court, addressing language similar to that found in the Nebraska statutes, noted that a temporary guardian was designed, under the probate code, to take care of emergencies. The court explained that "[t]he principal purpose of a temporary appointment is to take care of urgent and emergent matters that have arisen, and where prompt action is essential before the legal requirements for the appointment of a permanent guardian can be met." *Id.* at 608, 361 S.W.2d at 265. Thus, the court illustrated that, for example, instances could arise where a delay would cause irreparable damage to the estate of an alleged incapacitated person.

Here, while certain actions of the temporary guardian concerning Larson's medical care and financial dealings were arguably necessary, it is hard to imagine that other actions, such as the separate suit against Toman to set aside the 100-acre land transfer, were essential to any urgent matter. Of course, the court did not make any specific findings as to emergency matters, nor did it make any attempt to limit the temporary guardian and conservator to such matters. Accordingly, we have little to review.

It is clear that the failure of the court to follow the statutory mandates with regard to the limited nature of the powers and duties of the temporary guardian and conservator, as well as its failure to follow the mandate of a timely evidentiary hearing on competency, constitutes plain error. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

We determine that the appropriate disposition of this appeal is to remand the cause to the trial court with directions to expedite an evidentiary hearing on Larson's competency and what permanent arrangements, if any, are necessary to protect Larson if he is shown to be incapacitated. In the meantime, the court is directed to limit Looby's authority as guardian and conservator to those powers necessary to address the emergency alleged to exist in the petition that resulted in his appointment. Until Larson is determined to be incapacitated, we further direct the court to honor his election as to whom he wishes to represent him.

VI. CONCLUSION

We decline to address the parties' assignments of error, as none of the issues raised are properly before us. We remand the cause with directions for the court to conduct an immediate evidentiary hearing as set forth above.

REMANDED WITH DIRECTIONS.

In re Guardianship and Conservatorship of Larson
270 Neb. 837, 708 N.W.2d 262

IN THE COUNTY COURT OF
DOUGLAS COUNTY, NEBRASKA

IN THE MATTER OF THE	)	
GUARDIANSHIP	)	PR 04-1145
AND CONSERVATORSHIP OF	)	
	)	ORDER
EVERETT D. LARSON,	)	
	)	
An Incapacitated Person.	)	
	)	

This matter came before the court following the entry of the Supreme Court's opinion and mandate in In re Guardianship and Conservatorship of Larson, 270 Neb. 837. Upon consideration of the evidence presented at trial and the pleadings filed in this matter, the court finds and orders as follows:

INTRODUCTION

1. A pretrial conference was held on February 24, 2006 with the trial to commence thereafter. During the pretrial conference, Everett D. Larson ("Everett") chose Kirk Meisinger ("Meisinger") to be his attorney. Meisinger informed the court that David Cullan ("Cullan") and Margaret Badura ("Badura") would be his co-counsel.

2. The pleadings before the court were the Petition for Appointment of Guardian and Conservator and the Petition to Revoke the Medical Care Power of Attorney. Barbara Prokupek and W. Hendry Looby were represented by Gerald L. Friedrichsen and Susan J. Spahn; Sally

Hytrek; the court appointed guardian ad litem, was represented by Steven Lefler. Joseph Toman was represented by John Ellis and D. C. Bradford. All parties had full and complete opportunity to present evidence regarding whether Everett had sufficient mental capacity to execute documents in November, 2003 and currently.

3. Following the selection of Everett's attorney, counsel for Everett objected to the commencement of trial due to the need for preparation time. Although the Supreme Court had ordered the trial to be expedited, based upon counsel for Everett's request that they be given time to prepare for trial and the consent and agreement of all interested persons, the first day of trial was scheduled for March 13, 2006. Trial continued on the following dates: March 14, 15, 27 and 28; April 10, 11, 14, 17, 18, 19, 20, 21, 24, and 25; May 8, 11, 23, 24, 25 and 26; June 1, 2, 5, 7, 8, 14, 15, 16, and 30; July 6, 7, 10, 11, 12, 13, and 31; August 18 and 28.

4. Everett Larson is now a 76 year old man (DOB 9/9/30) and prior to July, 2004 lived on his family homestead in rural Plattsmouth, Nebraska. His wife, Beverly, died in November, 1988 and he is a widower. He has two adult children, David Larson and Barbara Prokupek. David Larson is single and lives in Michigan. Barbara is married with three daughters. She has lived in Plattsmouth her entire life.

5. Barbara filed a petition for the appointment of a temporary and permanent guardian and conservator on August 3, 2004. On August 3, 2004, Looby was appointed temporary guardian and conservator and has served in that capacity to the present time.

6. The court finds that the Petition for Appointment of a Temporary Guardian and Conservator and Permanent Guardian and Conservator was filed in good faith. The court finds neither Prokupek, Looby nor their attorneys exhibited any bad faith throughout these proceedings.

7. The court finds that neither Prokupek nor Looby nor any of their attorneys concealed the power of attorney for medical care dated November 5, 2003, as defined in Neb. Rev. Stat. § 30-3432.

8. The court finds that Sally Hytrek, guardian ad litem, complied with the order of this court and has properly carried out her duties, as provided by the Nebraska Probate Code. The court finds Hytrek's recommendations persuasive, those recommendations being that Everett needs a guardian and conservator appointed for him; Looby has done a good job as temporary guardian and temporary conservator; Toman should have no contact with Everett; and Looby should be appointed permanent guardian and permanent conservator.

9. The court finds that some of Everett's long term memory is intact in that he is able to recognize his home place and pictures of friends and family and is able to describe his farm equipment. The court, however, finds Everett's testimony regarding the documents he signed in 2003 to be nonpersuasive and not credible. The court notes that this line of questioning consisted of Everett's attorney holding enlarged copies of the documents in front of Everett, pointing to certain portions of the document and

asking Everett simplistic questions about the document. Everett gave no independent testimony regarding the documents he signed in 2003. Everett failed to provide a correct meaning for the word "forfeit" stating it means "to give it to him." When his attorney gave him the deed transferring 100 acres ("the Ranch") to Toman, his attorney asked him what it did and Everett's response was "This is for him to help me – is that right?" After being encouraged to read the deed, he responded, "That's when I gave him the place, isn't it?"

10. The court finds that Everett does not understand the purpose of the court proceedings in that Everett refused to answer questions asked of him by opposing counsel, by the court, and by his own counsel.

ANALYSIS OF EXPERTS AND OTHER WITNESSES

11. The court finds that Dr. Carl Greiner, Dr. Arun Sharma, Dr. William Roccaforte, Dr. Norman Grosbach, Dr. Steven Schwarz, and Dr. Zuber to all qualify as experts about the areas to which they testified. The court also finds these doctors to be credible and their testimony was persuasive. The court finds that all of these doctors testified that Everett suffered or suffers from dementia and diminished capacity at various times beginning in 1999.

12. The court finds that the opinions of Dr. Davis, as set forth in his report and as testified to at trial, are not supported by the medical evidence and objective testing conducted by Dr. Thurman, and are the result of inaccurate information provided to Dr. Davis.

13. The court finds Dr. Davis' assertion that the other six doctors were not applying the right standards to determine competency to be not credible.

14. The court finds Dr. Davis' opinion that Everett is currently competent to execute documents provided they are explained to him simply and thoroughly in not credible and not supported by the other overwhelming medical evidence to the contrary.

15. The court finds that Dr. Ty Callahan did not review sufficient records to render his opinion of Everett's capacity in 2003 persuasive. The court further finds that Dr. Callahan's failure to investigate statements told to him by Everett, and his manipulated interview/test in regards to a health care power of attorney, and failure to consider relevant medical records render his review inadequate. For those reasons, the court finds that his opinion of Everett's mental abilities in November, 2003 is not persuasive.

16. The court also finds Ronald Svoboda's interview and meetings with Everett inconclusive in establishing Everett's competency or capacity to execute any documents in October or November, 2003. The court also finds the testimony of Ronald Svoboda, David Chebatoris and Deanna Weidner to be nonpersuasive on the issue of whether Everett had sufficient competency or capacity to execute any documents in October or November, 2003.

EVERETT SUFFERS FROM SERIOUS MENTAL IMPAIRMENTS

17. The court finds by clear and convincing evidence that Everett suffers from extremely poor short term memory and poor decision making skills and is unable to manage his affairs due to cognitive impairments, as a result of dementia; Everett demonstrates poor problem solving skills and his judgment is lacking.

18. The court finds by clear and convincing evidence that Everett has significant mental health problems which included chronic dementia and episodic confusion, both conditions substantially limiting his ability to reason through alternatives and make judgments. The courts finds by clear and convincing evidence that Everett's emotional instability and suspiciousness has several consequences, including that he becomes angry with his family and/or guardian when they attempt to limit his activities.

19. The court finds by clear and convincing evidence that Everett has difficulty with perceptive reasoning and abstract reasoning and they are used in executive functioning, in exercising judgment, and in receiving/weighing/making decisions, in making decisions regarding day to day life and also financial, medical and legal decisions.

20. The court finds by clear and convincing evidence that Everett's impaired memory increases his vulnerability to others because without a good memory, Everett is more dependent on others to fill in the actual context of events. The court finds by clear and convincing evidence that Everett is susceptible to others for providing a context of his past, including his relationship with his son and daughter.

21. The court finds by clear and convincing evidence that Everett is vulnerable to persons who simply agree with him because he does not have the insight to identify where his views are based upon significant misunderstandings. The court finds that Toman has encouraged Everett's misunderstanding of events.

22. The court finds that since the summer of 2002, Everett has wrongfully blamed Barbara for his various placements in nursing homes following hospitalizations and misattributed the assessment that he had been confused to Barbara rather than the medical reports. The court finds by clear and convincing evidence that Everett is unable, because of his dementia, to consider any alternate explanation to his perception of what had been the sequence of events; that is, he does not have the ability to indentify that his recollection of events could be faulty.

23. The court finds that Everett's beliefs that Barbara was "nastier than hell" to her mother, "never came around to their home" and "never helped her parents" are delusions in that they are unshakable convictions that cannot be countered with relevant alternative information and they first manifested themselves in the summer of 2002 and the intensity of Everett's negative delusions about Barbara increased in the spring and summer of 2003.

24. The court finds by clear and convincing evidence that Everett's negative opinions and beliefs about Barbara, specifically but not limited to her role in his health care, are delusions and these delusions first appeared in the summer, 2002 and increased following Everett's hospitalization in the spring, 2003.

25. The court finds by clear and convincing evidence that Everett does not appreciate his actual physical and mental condition which makes it very difficult for him to access the limitations placed on him; he concludes that his restrictions are punishment or that he is being dealt with as a criminal. The court finds by clear and convincing evidence that persons have attempted to explain the circumstances of his limitations and the reasons for his placement in a nursing home, but these efforts did not result in any increased insight by Everett; he, instead, blames Barbara for his current situation. The court finds by clear and convincing evidence that Everett is vulnerable to individuals who simply agree with him, such as Toman.

26. The court finds by clear and convincing evidence that Everett's delusional thoughts about Barbara affect his ability to make decisions that involve or could involve her.

27. The court finds by clear and convincing evidence that Everett cannot judge who would act in his best interests because of his cognitive impairment, memory impairment and delusions about Barbara.

28. The court finds by clear and convincing evidence that Everett has limited mental capacity and judgment which makes him unable to serve as his own decision-maker for his health care because of his limited insight into his own health problems.

29. The court finds by clear and convincing evidence that Everett's limited mental capacity, dementia, and delusions about Barbara prevent him from being able

to determine who would necessarily act in his best interests; accordingly, the court finds by clear and convincing evidence that Everett lacks sufficient capacity to make or revoke a durable general power of attorney or medical care power of attorney.

30. The court finds by clear and convincing evidence that Everett's mental and memory impairments render him vulnerable to exploitation because he completely believes those persons he trusts and refuses to accept any correction for his opinion of those he does not trust. The court finds by clear and convincing evidence that these mental impairments existed in November, 2003 when Everett executed the power of attorney for health care naming Toman and the power of attorney naming Doug Duey.

EVERETT NEEDS A GUARDIAN AND CONSERVATOR

31. The court finds by clear and convincing evidence that Everett cannot manage living arrangements due to two major issues, his dementia and suspiciousness which make it difficult for Everett to make appropriate decisions about who would act in his best interest. Dr. Greiner also opined that with Everett's memory problems, concentration problems, intense emotionalism, and misjudgment of what people say, he does not believe Everett is able to make financial decisions. Dr. Greiner concluded Everett needs a guardian and conservator based on lack of comprehension of nature of problems, moderate dementia, and impaired memory and that, for the same reasons, Everett would not be able to make a decision as to who should have that authority.

32. The court finds by clear and convincing evidence that Everett does not have capacity currently to execute a medical POA. Everett has dementia indentified by severe memory problems and problem with executive functioning.

33. The court finds by clear and convincing evidence that Everett Larson is incapacitated and that the appointment of a guardian and conservator are necessary or desirable as the least restrictive alternative available for providing continuing care or supervision for him.

34. The court finds by clear and convincing evidence that a full guardianship is necessary. The court has taken into consideration Everett's expressed wishes. Everett testified that if the appointment of someone to manage things for him was necessary, he wanted one of his banks appointed. No evidence has been presented concerning whether either of Everett's banks is able to serve in a fiduciary capacity. Although Everett testified that he did not want Looby appointed, the court finds that Everett did not give sound reasons for his dislike of Looby, and, instead, evidence was presented that Everett's opinion of Looby is based upon misinformation given to him and upon Everett's mental impairments. The court also finds that Everett will most likely dislike any person appointed to act as guardian and conservator for him when that person so appointed makes a decision is opposition to Everett's wishes.

35. The court finds that Everett's dislike and distrust of Looby is caused by his dementia and is due to the influence of others, including Toman.

36. The court finds that there is no need for the court to make any rulings on the Durable Power of Attorney naming Douglas Duey as attorney-in-fact and signed by Everett on November 5, 2003 due to the fact that Duey has renounced any right to serve under that document and it is null and void. The Court also finds that it [does][1] not need to determine whether Duey has priority for appointment as guardian pursuant to NPC §30-2627(b)(2) for that same reason.

37. The court finds by clear and convincing evidence that:

A. Everett currently suffers from dementia, mental incapacity, and impaired short term memory, which affects his cognitive function (that is, executive functioning) and his judgment;

B. Everett is not capable of receiving and understanding information and weighing that information to make decisions. Everett is not capable of making sound decisions about his health care, his living situation, nor his personal or financial affairs;

C. Everett requires the appointment of a guardian and conservator to make health care decisions, and living arrangement decisions, and financial decisions for him and that no less restrictive alternative is available;

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[1] Handwritten change added

D. Everett's property is vulnerable to waste or being dissipated unless a conservator is appointed.

E. W. Henry Looby has served as temporary guardian and temporary conservator for Everett since August 3, 2004 and his actions have been in Everett's best interests; and

F. It is in Everett's best interests that W. Henry Looby be appointed Everett's permanent guardian and permanent conservator.

38. The court finds that Everett Larson is incapacitated and lacks sufficient understanding to make or communicate responsible decisions concerning his own person and in the following areas:

a. Selecting his place of abode.
b. Arranging for his medical care.
c. Protecting his personal effects.
d. Giving necessary consents, approvals or releases.

39. The court finds by clear and convincing evidence that:

A. Everett Larson is unable to manage his property and property affairs effectively for reasons such as mental illness and mental deficiency; and

B. Everett Larson's property will be wasted or dissipated unless proper management is provided.

40. The court finds by clear and convincing evidence that the appointment of a conservator for Everett Larson is needed.

THE NOVEMBER, 2003 POWER OF ATTORNEY FOR HEALTH CARE IS INVALID

41. The court finds by clear and convincing evidence that there has been no change in Everett's mental condition from the summer of 2003 to present day and that Everett's mental condition, as set forth above and specifically in paragraphs 17 through 30, was also Everett's mental condition in October and November, 2003.

42. The court finds by clear and convincing evidence that as of November 2003 and forward due to Everett's psychopathology of paranoia and suspiciousness combined with dementia, Everett was susceptible to undue influence.

43. The court finds by clear and convincing evidence that during the time frame of August through November, 2003, Toman had the opportunity to and did exercise undue influence over Everett resulting in the formulation of an estate plan, including the execution of the power of attorney for health care naming Toman.

44. The court finds by clear and convincing evidence that when Everett signed the power of attorney for health care in November, 2003 Everett suffered from

dementia and delusions about Barbara and they rendered him unable to understand and unable to comprehend the purport and effort of what he was doing. The court finds by clear and convincing evidence that petitioner has overcome the rebuttable presumption that Everett was competent when he executed the November, 2003 power of attorney for health care.

45. The court finds by clear and convincing evidence that Everett's mind was so weak and unbalanced when he executed the power of attorney for health care on November 5, 2003 that Everett could not understand or comprehend the purport and effect of what he was doing. The court finds by clear and convincing (sic) that during the execution of the estate plan in November, 2003, Everett's mind was so weak and unbalanced that Everett could not understand or comprehend the purport and effect [of][2] the estate plan he executed during that period, including the power of attorney for health care naming Toman.

46. The courts by clear and convincing evidence that, in October and November, 2003, and specifically on November 5, 2003, Everett's mental faculties have been impaired to such an extent that he was unable to properly, intelligently and fairly protect and preserve his property rights.

47. Based upon the foregoing, the court finds by clear and convincing evidence that the power of attorney for health care executed November 5, 2003 is invalid.

JOSEPH TOMAN HAS ACTED AGAINST

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[2] Handwritten change added

EVERETT'S BEST INTERSTS AND IS UNABLE TO ACT IN HIS BEST INTERESTS

48. The court finds by clear and convincing evidence that Toman acted against Everett's best interests when, on April 1, 2005, he removed Everett from Hallmark and transported him to Woodbridge without obtaining a doctor's discharge, without knowing whether Everett had taken his medications that morning, without knowing what medications Everett was then taking, and without contacting Woodbridge beforehand to learn if they had a room available.

49. The court finds that in July, 2004, Toman may have violated Neb. Rev. Stat. section 30-3414 because he failed to notify either of Everett's children that he had utilized his authority under the November 5, 2003 Power of Attorney for Health Care by transferring Everett from Midlands Hospital to Methodist Hospital. Even if Toman's failure is not in violation of this section, his failure to notify Everett's family that Everett had been hospitalized was not in Everett's best interest.

THE NOVEMBER, 2003 POWER OF ATTORNEY FOR HEALTH CARE IS REVOKED

50. The court finds by clear and convincing evidence that if the November 5, 2003 power of attorney for health (sic) naming Toman were valid, it is now revoked by this court. The court finds and determines by clear and convincing evidence that Toman used the power of attorney for health care in a manner that was not in Everett's best interests, that Everett is unable to express his wishes due

to his mental impairments, and Everett now lacks the capacity to revoke the Power of Attorney for Healthcare.

W. HENRY LOOBY SHOULD BE AND IS APPOINTED PERMANENT GUARDIAN AND CONSERVATOR

51. The court finds it has no need to determine whether Toman has priority for appointment as guardian pursuant to NPC § 30-2627(b)(2) because it is in Everett's best interests to pass over persons having priority and appoint a person having no priority. The court also finds by clear and convincing evidence that Toman is not qualified to serve as guardian for Everett, that he has not acted in Everett's best interests and has not demonstrated to the court that he would be able to act in Everett's best interests. The court also finds by clear and convincing evidence that Toman refuses or is unable to acknowledge Everett's mental and memory impairments and he, therefore, has unrealistic expectations regarding Everett's abilities.

52. The court finds that Looby is qualified and competent to serve as conservator and guardian.

53. The court finds by clear and convincing evidence that Looby's actions as temporary guardian and conservator have been appropriate and that Looby has acted in Everett's best interests. The court finds by clear and convincing evidence that Looby should be appointed permanent guardian and conservator for Everett and Letters shall issue to Looby upon the filing of his acceptance.

ATTORNEY FEES AND COSTS

54. The court finds that Badura, Cullan, and Meisinger ("the three Attorneys") failed to act in Everett's best interests and, instead, their actions were to his detriment that they increased the petitioners' attorneys' fees and costs at no benefit to Everett, specifically, as follows:

A. There is overwhelming evidence in the medical records showing that Everett suffers from dementia and is impaired to the extent that he is unable to make decisions for himself and these records were available to the three Attorneys.

B. The Guardian ad Litem's Initial Report, filed with the court in October, 2004, documented her observations that Everett can appear to be mentally okay, but that, during the course of their meeting, she recognized that Everett did have mental impairments. Hytrek also expressed concern with Everett's suspiciousness and anger at family for putting him in Hallmark and his poor memory.

C. The litigiousness of this case resulted from the actions of Badura, Cullan, and Meisinger ("the three Attorneys") in removing Everett from his primary care physician and Hallmark nursing home in December, 2004 under the invalid authority obtained by them from the Douglas County District Court.

D. None of the pleadings filed by the three Attorneys in the Douglas County Court proceedings notified the court of the November, 2003 powers of attorney.

E. The three Attorneys spent over 180 hours during the month of December, 2004 in which they frustrated the County Court proceedings by filing a Complaint in the Douglas County District Court.

F. The three Attorneys frustrated the efforts of this court by constantly and continually refusing to comply with the notice provisions of Neb. Rev. Stat. §30-2220.

G. The three Attorneys made several unsuccessful efforts to obtain relief by filing petitions for writs for mandamus with the Nebraska Supreme Court.

H. In 2006, the three Attorneys spent over 120 hours on pretrial motions that only served to frustrate the efforts of this court to comply with the Supreme Court mandate that the trial proceed expeditiously.

I. The three Attorneys used these proceedings, in discovery and in trial, to illicit evidence to discredit portions of the Guardian ad Litem's Report concerning their actions that was irrelevant to the issue of Everett's competency.

55. Based upon the foregoing, the court finds that the three Attorneys are not entitled to any fee from the Ward's estate and their requests for fees and reimbursement of out-of-pocket expenditures are denied.

56. The court finds that the fees of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., incurred by the Petitioner and Guardian/Conservator, as set forth in Susan J. Spahn's Affidavit and Supplemental Affidavit, were reasonable, necessary and fair under the circumstances and should be awarded, however, due to the equities of this estate, they are reduced by 10%. Accordingly, the conservator is directed to pay to these attorneys the sum of $279,408.60 for their fees.

57. The court finds that out-of-pocket costs of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., incurred by the Petitioner and Guardian/Conservator, as set forth in Susan J. Spahn's Affidavit and Supplemental Affidavit, are reasonable, necessary and fair under the circumstances and should be awarded and the conservator is directed to pay to these attorneys the sum of $34,217.21 for the costs.

58. The court finds that the fees and out-of-pocket expenses of Sally Hytrek, guardian ad litem are reasonable, necessary and fair under the circumstances and should be awarded. The conservator is directed to pay to Sally Hytrek $29,729.20.

59. The court finds that the fees and out-of-pocket costs of Steve Lefler, attorney for Sally Hytrek, guardian ad litem are reasonable, necessary and fair under the circumstances and should be awarded. The conservator is directed to pay to Steve Lefler $5,337.00.

60. The court finds that the fees of Mary Wilson, initial attorney for Larson (sic) are reasonable, necessary

and fair under the circumstances and should be awarded. The conservator is directed to pay to Mary Wilson $4,031.25.

61. The court finds that the fees and out-of-pocket costs of John Lynch, initial attorney for Barbara Prokupek are reasonable, necessary and fair under the circumstances and should be awarded. The conservator is directed to pay to John Lynch $2,920.00.

Dated this [27th][3] day of [Nov.][4], 2006.

BY THE COURT:

Jane H. Prochaska
County Court Judge

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[3] Handwritten change added

[4] Handwritten change added

CERTIFICATE OF MAILING

I, Cynthia L. Vandenbroucke, A Clerk of the County Court, do hereby certify that on the 28th day of November 2006, I mailed a true copy of the foregoing order to the following named person by depositing the same in the United States Mail, postage prepaid.

Margaret Badura 7602 Pacific Street Suite 300 A Omaha, Ne 68114

David Cullan 1113 Harney Street Omaha, Ne 68102

Kirk Meisinger, 1207 South 75th Street Omaha, Ne 68124

Fitzgerald, Schorr, Barmettler & Brennan 13200 California St #400 Omaha, Ne
68154

Sally Hytrek 1823 Harney Street Suite 1006 Omaha, Ne 68102

Steve Lefler 1823 Harney Street Suite 1028 Omaha, Ne 68102

John Lynch 1823 Harney Street Suite 1016 Omaha Ne 68102

Mary Wilson 9910 North 48th Street Suite 106 P.O. Box 12445
Omaha, Ne 68112-0445

Bradford, Coenen 1620 Dodge Street Omaha, Ne 68102

Cynthia Vandenbroucke,
Assistant Clerk II

IN THE COUNTY COURT OF DOUGLAS COUNTY, NEBRASKA

IN THE MATTER OF THE	)	
GUARDIANSHIP/	)	
CONSERVATORSHIP	)	CASE NO.
	)	PR04-1145
OF	)	
	)	ORDER
EVERETT D. LARSON,	)	
	)	
An incapacitated Person.	)	

THIS MATTER came on for hearing, on the 17th day of January, 2007. Present in court were Susan Spahn and Gerald Friedrichsen, on behalf of the present Guardian and Conservator, W. Henry Looby and Barbara Prokupek. The Guardian ad Litem for the above named ward, Sally Hytrek, was present, as was Margaret Badura, Diana Vogt and David Cullan, on behalf of the ward, and John Ellis appeared for Joseph Toman.

This hearing was scheduled to hear a Motion for an Order Nunc Pro Tunc, regarding a December 19th, 2006 Order signed by Judge Jane H. Prochaska, which incorrectly stated that attorney Gregory Drew was present at that hearing. Also scheduled was a Motion for an order Nunc Pro Tunc of an Order dated December 7th, 2006, regarding attorney fees for Gregory Drew that were allegedly stipulated to and allegedly entered into filed by Diana Vogt on behalf of the ward. Also scheduled for hearing was a Motion for an Order Nunc Pro Tunc, filed by John Ellis, of the same Order of December 7th, 2006, regarding attorney fees and stipulations allegedly entered into on behalf of Joseph Toman. Also scheduled was a

Motion to Appoint a Special Guardian/Conservator and For Other Relief Pending Appeal, filed by Diana Vogt. And finally scheduled for hearing was an Application to Proceed in Forma Pauperis, pursuant to Nebraska Revised Statutes 25-2301 et seq., filed by Diana Vogt.

Arguments were heard and the parties stipulated to an Order Nunc Pro Tunc regarding the December 19th Order of Judge Jane H. Prochaska, which incorrectly stated that attorney Gregory Drew was present. That Order was signed in the courtroom and that Motion granted. The Motions for an Order Nunc Pro Tunc regarding the December 19th, 2006 Order entered by Judge Jane H. Prochaska regarding attorney fees and stipulations with Mr. Drew, filed by Diana Vogt and John Ellis, were both agued and heard. The court feels that since the undersigned was not present at that proceeding, did not hear any purported stipulations or arguments it would be acting improperly in an appellate capacity if it were to change the Order dated December 7ty , 2006, as requested by both Ms. Vogt and Mr. Elis.

The Court heard argument regarding the Motion to Appoint Special Guardian/Conservator and For Other Relief filed by Ms. Vogt. The court noted during this hearing that Judge Jane H. Prochaska, on December 27th, 2006, this court heard nothing regarding any change in circumstances, or any action or inactions by w. Henry Looby that would show that he is not acting in the ward's best interests. Again, this court feels that to simply modify or disturb the Order dated December 27th, 2006, issued by Judge Jane H. Prochaska, this court would be acting improperly in an appellate capacity.

The court then heard argument regarding the Application to Proceed in Forma Pauperis pursuant to Nebraska Revised Statutes Section 25-2301, which relates generally to all civil and criminal cases. The statutory authority does not mention in any fashion any matters filed or heard pursuant to the Nebraska Probate Code. The court notes that the above captioned case was filed and heard pursuant to the Nebraska Probate Code as a Guardianship/Conservatorship proceeding. Neb. Rev. Stat. ¶ 30-2201 et seq. This court also notes that the Nebraska Probate Code has specific statutory language for appellate procedures, none of which mention the allowance for an in forma pauperis proceeding. Neb Rev. Sta. ¶ 30-1601. In fact, the statute specifically requires a supersedeas bond of a person other than a Personal Representative, Conservator, Trustee, Guardian or Guardian ad Litem, unless the court determines that no bond is needed. Since the ward, Ms. Badura, Ms. Vogt or Mr. Cullan or any other member of their respective law officers, are not a Personal Representative, Conservator, Trustee, Guardian or Guardian ad Litem, a supersedeas bond is required of them to proceed with an appeal in this matter. Since the above named ward presently has a Guardian/Conservator, W. Henry Looby, any appellate action would not jeopardize any assets of the above named ward, therefore removing the necessity for a supersedeas bond.

The court therefore must determine, for purposes of appeal in the above captioned matter, which statutory authority is controlling, the proceedings in forma pauperis, pursuant to Section 25-2301 et seq., or the appeals in probate matters under Section 30-16-1. The longstanding principal of statutory construction is that a specific statute takes precedence over a general statute when dealing with similar matters, because the specific expression of the legislative will concerning the subject matter. In re Involuntary Dissolution of Battle Creek State Bank, a Nebraska Banking Corporation, William B. Hengstler, co-Trustee of the A.W. Hengstler Testamentary Trust, Appellant vs. Battle Creek State Bank, et all, Appellees, 254 Nebraska 120, 575 N.W.2d 356. And where there is a conflict between two statutes on the same subject, the specific statute controls over the general statute. 254 Nebraska 120, 575 N.W.2d 356. And where there is a conflict between two statutes on the same subject, the specific statute controls over the general statute. Id.

The court therefore finds that the Motion for an Order Nunc Pro Tunc regarding the December 19th hearing should be granted and that Order is signed, showing that Mr. Gregory Drew was not present at that hearing.

The court further finds that the Motion for an Order Nunc Pro Tunc, filed by Diana Vogt on behalf of the above named ward, regarding the December 7th , 2006 Order entered by Judge Jane H Prochaska, should be denied.

The court further finds that the Motion for an Order Nunc Pro Tunc, filed by John Ellis on behalf of Joseph Toman, regarding the December 7th , 2006 Order entered by Judge Jane H. Prochaska, should be denied.

The court further finds that the Motion to Appoint a Special Guardian and Conservator and For Other Relief, filed by Diana Vogt, should be denied.

The court further finds that the Application to Proceed in Forma Pauperis, field by Diana Vogt pursuant to Nebraska Revised Statute 25-2301, does not apply in this matter and that the controlling applicable statutory authority is Nebraska Revised Statute 30-1601, and therefore should be denied.

THE COURT THEREFORE ORDERS, ADJUDGES AND DECREES that Order Nunc Pro Tunc filed by Margaret Badura, regarding the December 19th hearing is hereby granted, that order being signed showing the absence of Gregory Drew.

THE COURT FURTHER ORDRES, ADJUSDGES AND DECREES that the Motion for order Nunc Pro Tunc filed by Diana Vogt, regarding the attorney fees and stipulations of Gregory Drew, Order of December 7th , 2006, and the Motion Order Nunc Pro Tunc filed by Joseph Toman, by John Ellis, regarding the same Order, are hereby denied.

THE COURT FURTHER ORDERS, ADJUDGES AND DECERES that the Motion to Appoint Special Guardian/Conservator and For Other Relief, filed by Diana Vogt on behalf of the ward, is hereby denied.

THE COURT FURTHER ORDERS, ADJUDGES AND DECREES that the Application to Proceed in Forma Pauperis, filed by Diana Vogt pursuant to Nebraska Revised Statute Section 25-2301 et seq., is not applicable, and is therefore denied.

THE COURT FURTHER ORDERS, ADJUDGES AND DECREES that any appellate procedures will be dictated by the mandate of Nebraska Revised Statutes Section 30-16-1.

THE COURT FURTHER ORDERS, ADJUDGES AND DECREES that a supersedeas bond is not required of

Margaret Badura, Diana Vogt, Sherrets & Boecker LC, and David Cullan, Cullan & Cullan, to proceed with an appeal in this matter.

THE COURT FURTHER ORDERS, ADJUDGES AND DECREES that no funds or assets of the above named ward shall be used to pay any appellate costs in the above captioned matter without an Order of the court.

THE COURT FURTHER ORDERS, ADJUDGES AND DECREES that any and all costs of filing and docketing an appeal in this matter are to be paid by the party appealing this Order or any prior Orders in the above captioned matter.

Dated this 17th day of January, 2007.

BY THE COURT:
/s/ Jeffrey L. Marcuzzo
County Court Judge

IN THE COUNTY COURT OF DOUGLAS COUNTY, NEBRASKA

IN THE MATTER OF THE)
GUARDIANSHIP/)
CONSERVATORSHIP) CASE NO.
) PR04-1145
OF)
) ORDER
EVERETT D. LARSON.)
)
An incapacitated Person.)

THIS MATTER came on for hearing on a Petition and Motion for Legal Fees and Expenses filed by Margaret Badura; Amended Petition and Motion for Legal Fees and Expenses filed by Kirk Meisinger; Petition and Motion for Attorney Fees, Costs, Expenses and Interest filed by David Cullan' Motion to Compel Payment of Fees filed by John Lynch; Motion to Compel Payment of Fees filed by Sally Hytrek; Motion to Compel Payment of Fees filed by Susan Spahn; Motion to Withdraw filed by Susan Spahn; and Application for Fees and Costs filed by Susan Spahn. W. Henry Looby was present and represented by Kevin Dostal. John Lynch appeared for W. Henry Looby. Susan Spahn was present as previous attorney for W. Henry Looby and Barbara Prokupek. John Ellis appeared on behalf of Joseph Toman. Margaret Badura and Kirk Meisinger appeared as previous attorneys for Everett Larson. Sally Hytrek, Guardian Ad Litem for Everett Larson, appeared and was represented by Steven Lefler. Barbara Prokupek and her husband were also present at the hearing. David Cullan did not appear due to being out of town.

Hearing was held on the Motions and the court, being now fully advised in the premises, finds as follows:

1. As to the Motion to Withdraw filed by Susan Spahn, there were no objections to her Request to Withdraw, therefore the Motion was granted and a separate Order was signed allowing Ms. Spahn to withdraw.

2. As to Ms. Badura, Mr. Cullan and Mr. Meisinger's Motions for Attorney Fees and Costs, the court finds that Judge Prochaska's previous Order of November 27, 2006, which denied their fees, is still in full force and effect. Therefore, Ms. Badura, Mr. Cullan and Mr. Meisinger's Motions for Attorney Fees and Costs is denied.

3. As to the Motion to Compel Payment of Fees previously ordered by Judge Prochaska's Order of November 27, 2006, the court finds that the following fees are due and payable per Judge Prochaska's Order of November 27, 2006:

Fitzgerald Schorr	$313,624.81
Sally Hytrek	$ 29,729.20
Mary Wilson	$ 4,031.25
John Lynch	$ 2,920.00
Steve Lefler	$ 5,337.00

Fitzgerald Schorr is currently owed $234,018.92 from the Order entered November 27, 2006. There is also due and owing Guardianship and Conservator fees in the amount of $87,231.10 from an Order dated December 19, 2006. There is also $13,755.56 due to Greg Drew per an Order dated December 6, 2006. Therefore, the total of outstanding fees owed per pervious court Orders are $377,023.03. There has not been an updated Accounting filed with the court as to the Conservatorship assets since the death of Everett Larson. According to the arguments made at the hearing there are not enough Conservatorship assets to cover all of the above fees. Due to not having an up to date Accounting regarding the Conservatorship assets, the court cannot rule on how payments for fees should be made. Therefore, the court Orders the Conservator to forthwith file an updated Accounting with the court. The issue of the amount of fees to be paid to each party is continued to March 10, 2008, at 1:00 p.m., in Courtroom No. 30.

4. Ms. Spahn's Motion for Fees is continued for an evidentiary hearing to March 10, 2008, at 1:00 p.m., in Courtroom no. 30

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Ms. Spahn is allowed to withdraw and the court has signed a separate Order reflecting this.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Ms. Badura, Mr. Cullan and Mr. Meisinger's Motions for Attorney Fees and Costs is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the fees the court previously approved for Fitzgerald Schorr, sally Hytrek, Mary Wilson, John Lynch, Steve Lefler, Greg Drew and Henry Looby are due and owing under the Conservatorship. The issue of the amount of fees to be paid to each party is continued to March 10, 2008 at 1:00 p.m. in Courtroom No. 30.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Ms. Spahn's Application for Fees and Costs is continued for an evidentiary hearing to March10, 2008, at 1:00 p.m., in Courtroom No. 30.

Dated this 28th day of January, 2008.

BY THE COURT:

/s/ Susan M. Bazis
Susan M. Bazis
County Court Judge

In re Guardianship/Conservatorship of Everett D. Larson, an alleged incapacitated person.
Wilfred Henry Looby,
Appellee,
vs.
Everett D. Larson, appellee, and Margaret Badura, et al.,
Appellants.

No. S-08-215

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

Heavican, C.J., Wright, Connolly, Stephan, McCormack, and Miller-Lerman, JJ.

Miller-Lerman, J.

NATURE OF THE CASE

Three attorneys, Margaret Badura, David Cullan, and Kirk Meisinger, sought attorney fees in the county court for Douglas County for their claimed representation of the incapacitated person, Everett Larson, in guardianship and conservatorship proceedings before the county court. The county court denied their request, and they appeal. We conclude that the county court did not abuse its discretion in denying an award of attorney fees and costs to the appellants. We affirm.

STATEMENT OF FACTS

The appellants are three attorneys who were involved in guardianship and conservatorship proceedings held on behalf of Larson in the county court for Douglas County. The appellee is Wilfred Henry Looby, the individual the county court appointed as Larson's permanent guardian and conservator.

This court has previously addressed certain issues n this matter. See *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006) (Larson I). Several writs of mandamus were filed in this court, and two subsequent appeals related to this guardianship and conservatorship, which we consolidated, were dismissed as moot. See cases Nos. S-07-74 and S-07-94.

The facts surrounding the events that occurred prior to the first appeal are recited in Larson I and will not be restated in this opinion. In summary, after rejecting various assignments of error, we concluded in Larson I that plain error had occurred in various respects due to the county court's failure to hold an evidentiary hearing on Larson's competency and the prolonged nature of the temporary guardianship and conservatorship.

In Larson I this Court stated:

> [w]e determine that the appropriate disposition of this appeal is to remand the cause to the trial court with directions to expedite an evidentiary hearing on Larson's competency and what permanent arrangements, if any, are necessary to protect Larson if he is shown to be incapacitated. In the meantime, the court is directed to limit Looby's authority as guardian and conservator to those powers necessary to address the emergency alleged

> to exist in the petition that resulted in his appointment.

270 Neb. at 856, 708 N.W.2d at 277.

In response to this order, a trial was held on the matter. On November 27, 2006, the county court entered an order that contained findings stating that Larson suffered from "chronic dementia and episodic confusion" and that he was delusional and emotionally unstable. The court further found that Larson's mental and memory impairments rendered him vulnerable to exploitation because "he completely believes those persons he trusts and refuses to accept any correction for his opinion of those he does not trust." The court found Larson to be incapacitated and appointed Looby as permanent guardian and conservator of Larson's estate.

In its order, the court acknowledged that Larson did not agree with Looby's appointment and stated that Larson "did not give sound reasons for his dislike of Looby, and, instead evidence was presented that [Larson's] opinion of Looby is based upon misinformation. . . ." The court also found that the three attorneys, Badura, Cullan, and Meisinger, had failed to act in Larson's best interests, and, to the contrary, that their actions were to Larson's detriment in that they increased Larson's costs at no benefit to him. Specifically the county court found that:

> A. There is overwhelming evidence in the medical records showing that Everett suffers from dementia and is impaired to the extent that he is unable to make decisions for himself and these records were available to the three Attorneys.

B. The Guardian ad Litem's Initial Report, filed with the court in October, 2004, documented her observations that Everett can appear to be mentally okay, but that, during the course of their meeting, she recognized that Everett did have mental impairments. Hytrek also expressed concern with Everett's suspiciousness and anger at family for putting him in Hallmark and his poor memory.

C. The litigiousness of this case resulted from the actions of Badura, Cullan, and Meisinger ("the three Attorneys") in removing Everett from his primary care physician and Hallmark nursing home in December, 2004 under the invalid authority obtained by them from the Douglas County District Court.

D. None of the pleadings filed by the three Attorneys in the Douglas County Court proceedings notified the court of the November, 2003 powers of attorney.

E. The three Attorneys spent over 180 hours during the month of December, 2004 in which they frustrated the County Court proceedings by filing a Complaint in the Douglas County District Court.

F. The three Attorneys frustrated the efforts of this court by constantly and continually refusing to comply with the notice provisions of Neb. Rev. Stat. §30-2220.

G. The three Attorneys made several unsuccessful efforts to obtain relief by filing petitions for writs for mandamus with the Nebraska Supreme Court.

> H.In 2006, the three Attorneys spent over 120 hours on pretrial motions that only served to frustrate the efforts of this court to comply with the Supreme Court mandate that the trial proceed expeditiously.
>
> I. The three Attorneys used these proceedings, in discovery and in trial, to illicit evidence to discredit portions of the Guardian ad Litem's Report concerning their actions that was irrelevant to the issue of Everett's competency.

Based on these findings, the county court denied Badura, Cullen, and Meisinger's request for attorney's fees.

Larson appealed from the November 27, 2006 order, which as noted, found Larson to be incapacitated, appointed Looby as conservator and guardian and denied fees to the appellants herein. Larson moved for an order allowing him to proceed *in forma pauperis* ("IFP") on appeal, or in the alternative, for an order directing his conservator to pay for the record on appeal. On December 31, the county court denied the motion to proceed IFP. Larson appealed the denial of the motion. The initial appeal from the November 27 order and the appeal from the associated denial of the motion for IFP status were consolidated before this court. The issue of the denial of the appellants' request for attorney fees was not raised in either appeal.

Prior to oral argument on the consolidated appeals, Larson died. This court dismissed the appeals as moot. After dismissal of the appeals, the appellants renewed their request for attorney fees in the county court. Based on the reasons set forth in its November 27, 2006, order outlined above, on January 28, 2008, the county court again denied the appellants' motion for attorney fees. The appellants appeal.

ASSIGNMENTS OF ERROR

In their assignments of error, the appellants raise many issues which occurred during the pendency of this matter but were not addressed or ruled on in the January 28, 2008 order from which they appeal. This court will limit its resolution of the case to the central matter addressed in the January 28 order. Thus, rephrased and summarized, the appellants claim that the court erred by denying their renewed request for attorney fees and costs.

STANDARD OF REVIEW

When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion. *In re Estate of Chrisp,* 276 Neb. 966, 759 N.W.2d 87 (2009).

ANALYSIS

The general rule with respect to the award of attorney fees under Nebraska law is that attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. See *In re Estate of Chrisp, supra.*

In this case, the appellants claim that Larson wanted them to represent him with respect to various aspects of the county court proceedings. The appellants further argue that the statutory authority that provides that the court may appoint counsel for an incapacitated person Neb. Rev. stat. § 30-2619(b) (Reissue 2008), and that an incapacitated person is entitled to be present by counsel at proceedings on the issue of capacity, § 30-2619(d), imply that all counsel who appear must be paid.

Looby argues that attorney fees are not allowed on these facts and that, in any event, the appellants waived their challenge to the county court's denial of their recently-renewed request for attorney fees because they failed to raise the issue on the initial denial of attorney fees in the 2007 consolidated appeals. *See Pennfield Oil Co. v. Winstrom,* 276 Neb. 123, 752 N.W.2d 588 (2008) (discussing waiver of issue by failure to assert in prior appeal).

For purposes of analysis in this case, we assume, but do not decide, that a basis permitting the recovery of attorney fees exists and that the appellants did not waive the issue of their request for attorney fees, notwithstanding their failure to assert as error the initial denial of attorney fee in the 2007 consolidated appeals. Based on the record in this case, we conclude that the county court's denial of the appellant's renewed motion for attorney fees for which this appeal is taken was not an abuse of discretion. *See In re Estate of Chrisp, supra.*

In this case, the county court's January 28, 2008, order denying the appellants' renewed request for attorney fees, effectively relied on the findings in the November 27, 2006, order recited above. The record indicates that there was significant evidence that Larson was incapacitated and unable to select counsel and that this evidence was available to the appellants who were not recognized by the court as Larson's counsel. In the November 27, 2006 order the court found that the appellants were not entitled to attorney fees because the appellants improperly delayed the court proceedings and ultimately prolonged matters and increased Larson's costs. Although the court did not doubt that the appellants' efforts were earnest, the court found that the appellants did not in fact act in the best interest of Larson. Based on these findings, which are supported by the record and were adopted by the court in its January 28, 2008 order, we see no abuse of discretion in the county court's January 28 denial of attorney fees and costs. Accordingly, we affirm.

CONCLUSION

The county court did not abuse its discretion in denying the appellants' request for attorney fees and costs.

AFFIRMED.

Gerrard, J., participating on briefs.

TEXT OF NEBRASKA STATUTES

Neb. Rev. Stat. § 30-2626(a) states in pertinent part:

> If a person alleged to be incapacitated has no guardian and an emergency exists, the court may, pending notice and hearing, exercise the power of a guardian or enter an *ex parte* order appointing a temporary guardian to address the emergency . . . . [and] shall specify the powers and duties of the temporary guardian limiting the powers and duties to those necessary to address the emergency.

Neb. Rev. Stat. § 30-2626(e) requires that a temporary guardianship as described above:

> [S]hall terminate at the end of the ninety-day period in which the temporary guardianship is valid or at any time prior thereto if the court deems the circumstances leading to the order for temporary guardianship no longer exist or if an order has been entered as a result of a hearing pursuant to section 30-2619 which has been held during the ninety-day period.

Neb. Rev. Stat. § 30-2625(c) requires that the subject of a petition for declaration of incapacity and certain family members must receive notice of certain rights conferred by the statute, which are:

> (c) In addition to notifying him or her of the filing of the petition and the time and place of the hearing on the petition, the notice required to be served upon the person alleged to be incapacitated shall list the following rights of the person:

(1) The right to request the appointment of an attorney;

(2) The right to present evidence in his or her own behalf;

(3) The right to request that the power of the guardian, if appointed, be limited by the court;

(4) The right to be notified regarding how to contact the temporary guardian if a temporary guardian is appointed;

(5) The right to compel attendance of witnesses;

(6) The right to cross-examine witnesses, including the court-appointed physician;

(7) The right to appeal any final order; and

(8) The right to request a hearing closed to the public.

(d) If a temporary guardian has been appointed, the notice required in subsection (c) of this section shall include a notice of such appointment and of the right to request an expedited hearing pursuant to section 30-2626.

Neb. Rev. Stat. § 30-2627(b) provides that a guardian will be selected according to statutory priorities and Neb. Rev. Stat. § 30-2627(c) requiring the wishes of the ward be considered to the extent possible. It states in relevant part:

(b) Persons who are not disqualified under subsection (a) of this section and who exhibit the ability to exercise the powers to be assigned by the court have priority for appointment as guardian in the following order:

(1) A person nominated most recently by one of the following methods:

(i) A person nominated by the incapacitated person in a power of attorney or a durable power of attorney;

(ii) A person acting under a power of attorney or durable power of attorney; or

(iii) A person nominated by an attorney in fact who is given power to nominate in a power of attorney or a durable power of attorney executed by the incapacitated person;

(2) The spouse of the incapacitated person;

(3) An adult child of the incapacitated person;

(4) A parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;

(5) Any relative of the incapacitated person with whom he or she has resided for more than six months prior to the filing of the petition;

> (6) A person nominated by the person who is caring for him or her or paying benefits to him or her.

> (c) When appointing a guardian, the court shall take into consideration the expressed wishes of the allegedly incapacitated person. The court, acting in the best interest of the incapacitated person, may pass over a person having priority and appoint a person having lower priority or no priority. With respect to persons having equal priority, the court shall select the person it deems best qualified to serve.

Neb. Rev. Stat. § 30-2628(a)(1) requires that any guardian use the least restrictive alternative to properly care for the ward. It states in pertinent part:

> When establishing the ward's place of abode, a guardian shall make every reasonable effort to ensure that the placement is the least restrictive alternative. A guardian shall authorize a placement to a more restrictive environment only after careful evaluation of the need for such placement.

TESTIMONY SHOWING DISRESPECT OF MR. LARSON

The following exchanged is one of the occasions on which Mr. Larson attempted to inform the Court that he did not want to have Mr. Looby as his guardian/conservator:

The Court: What else do you we need to take up?

The Court: Mr. Larson, can you hear okay?

Mr. Larson: Yeah. (indiscernible)

The Court: Good.

Ms. Spahn: Your Honor, the only other matter . . .

The Court: Excuse me. D . . .

Ms. Spahn: I'm sorry.

The Court. . . . You had a question?

Mr. Larson: No.

The Court: Yes, sir. (brief pause)

Ms. Spahn: I'm asking John Lynch to get us a blank order from the Court clerk's office so that we would ask the Court to continue Mr. Looby's appointment for an additional 90 days or as further ordered by the Court.

The Court: I will do so.

Ms. Spahn: Okay.

The Court: Why don't you write something out there and give it to me before you leave.

Ms. Spahn: Okay.

Mr. Cullan: For the record, your honor . . .

Mr. Larson: I was gonna tell you I do not want Mr. Looby for my . . .

Mr. Cullan: . . . we would object to any – any order of continuation beyond 90 days.

Mr. Larson: . . . guardian.

The Court: Yes, the record will so reflect. Yes. . I'm sorry, Mr. Larson, what did you say?

Mr. Larson: I said I do not want Mr. Looby for my guardian.

The Court: I understand that, sir.

Mr. Larson: (indiscernible)
(at this point brief pause)

Mr. Cullan: Your Honor, I presume that the recorder picked up his comment, that he does not want to have Mr. Looby as his guardian.

The Court: He was sitting right in front of the microphone

[306:23-308:12.]

On September 13, 2006, following a lengthy and detailed recitation of exhibits and exhibit numbers among the court and all counsel, the Court took it upon herself to put remarks regarding Mr. Larson into the record. As Mr. Cullan began to explain to the Court the extent of certain evidentiary materials, the court suddenly addressed Mr. Larson. The discussion was as follows:

> The Court: Mr. Larson, wake up?
>
> Mr. Cullan: He's awake Your Honor.
>
> The Court: He fell asleep. You were nodded off right in front of me.
>
> Mr. Cullan: Did you go to sleep? (inaudible)
>
> Mr. Cullan: He didn't.
>
> The Court: He sure did. Wake up Mr. Larson. Would you like a glass of water? Would that help?
>
> Mr. Larson: It might.
>
> (the record shows Mr. Larson being given a bottle of water and some additional remarks)
>
> Mr. Cullan: Let the record reflect that I asked Mr. Larson if [he] was asleep and he indicate [sic] that he had not been asleep.
>
> The Court: The record should also reflect that the Court – I was looking right at him as he

nodded his head off sound asleep only to be startled awake again when the Court addressed him.

Mr. Cullan: I'd like the record to reflect that Mr. Larson did not make any startling actions.

The Court: Mr. Lar – Mr. Cullan, you were looking at me when it happened, so you wouldn't have seen it. Let's proceed.

The next day the Court again took it upon herself to elicit testimony demeaning to Mr. Larson. The record shows the following:

The Court: Before we start, I did want to get something on the record, that we haven't hereto for [sic] and – and that is I wanted to note we are starting approximately 45 minutes late today. We started about an hour late on Tuesday because the record should reflect that we had incidents. Apparently – Mr. Looby, can you explain specifically for the record why Mr. Larson was late today and last – and Tuesday this week?

Mr. Looby: We had –

The Court: Turn the microphone please so we make sure we get it on the record.

Mr. Cullan: Your Honor, we object to this. We think it's irrelevant.

The Court: Objection is overruled. Please sit down, Mr. Cullan, Please sit down.

Mr. Cullan: Okay . . . .

Mr. Looby: We had issues with personal hygiene.

The Court: Specifically, please?

Mr. Cullan: Your Honor, we object to this. This is –

The Court: Objection is overruled. Sit down, Mr. Cullan.

Mr. Cullan: I just want to make my objection clear for the record, Your Honor.

The Court: Okay, Mr. Looby please be specific.

Mr. Cullan: I want to – if I could make my objection clear for the record.

The Court: Your objection is on the record; your objection is overruled.

Mr. Cullan: It – My objection is not on the record, Your Honor.

The Court: Mr. – Let Mr. Looby speak.

Mr. Cullan: If I could – if I could com –

The Court: You've made your objection and it is overruled.

Mr. Cullan: Okay.

(more comments between the court and Mr. Cullan)

Mr. Cullan: I have – I haven't been able to state why I'm objecting, Your Honor.

The Court: All right, make it quick.

Mr. Cullan: All of us, I think, including the Court are aware of the reason for Mr. Larson's being unable to be here. He was on his way down and had some – some problems, which problems are totally irrelevant to this proceeding. . . .

The Court: Thank you Mr. Cullan. Your objection is overruled. Mr. Looby, please proceed and please be specific.

Mr. Looby: We had transportation problems, with people arriving and Mr. Larson not being prepared because of his hearing aid and his bowels. And we had some issues of hygiene and cleanliness because of the incontinence and --

The Court: Please be more specific.

Mr. Looby: -- diarrhea. And we – we've been delayed repeatedly because of Mr. Larson's incontinent at the nursing home and his repeated bowels and diarrhea, which is an ongoing problem we've tried to manage . . .

(A discussion of Mr. Larson's age-associated physical difficulties continued for two more pages of testimony).